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Vol. 22 WINTER, 1955 No. 1

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THE JOURNAL OF
AIR LAW AND COMMERCE

Vol. 22 WINTER, 1955 No. 1

INTERCHANGE SERVICE AMONG THE AIRLINES OF THE UNITED STATES

By Donald C. Winkelhake

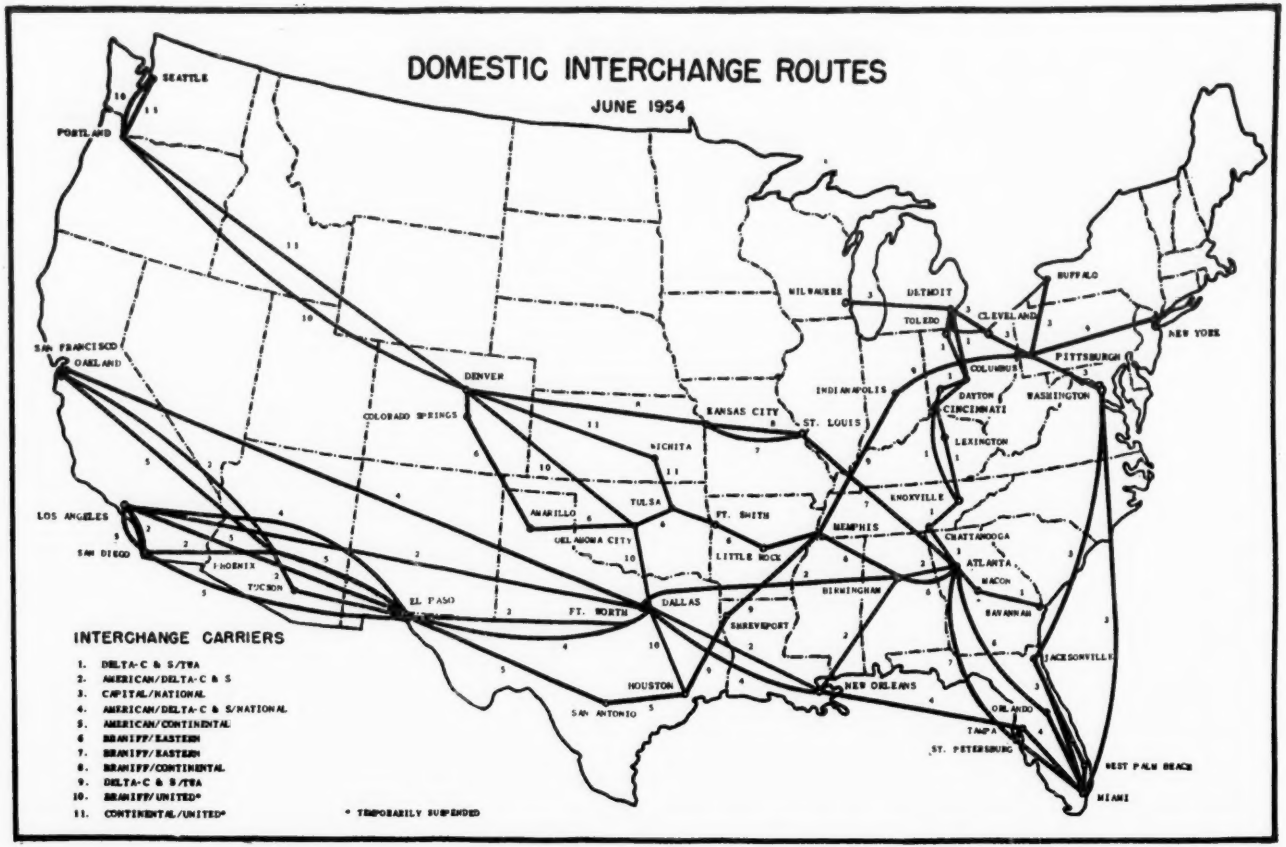
Economic Analyst, United Air Lines. B.S. Purdue University, 1949. M.S. University of Illinois, 1955.

THE air transportation industry of the United States is relatively young and dynamic. Its orderly growth actually began no more than sixteen years ago, when the Civil Aeronautics Act of 1938 placed the airlines under comprehensive federal regulation and expressed Congressional desire to promote air transportation. The growth and progress made by the airlines during the past sixteen years of federal promotion and regulation have been remarkable. Nevertheless, the airline industry has yet to reach full-blown maturity—a fact substantiated by the continued existence of federal subsidy payments to some airlines. The primary goal which remains to be achieved is an economically sound air transportation system. Methods for gaining this goal are many and varied. One such method is interchange service.

This article attempts to review the development, analyze the economics, and examine federal regulation of interchange service in order to determine the nature of the role it has been, is, and should be playing in the development of an economically sound air transportation system.

The Development of Interchange Service

Interchange service is the provision of one-plane through service over the connecting routes of two or more air carriers by the means of interchanging aircraft at the connecting point or points. When compared to the many years during which the railroads of the United States have been providing through service by interchanging equipment over the tracks of two or more carriers, interchange service among the airlines of the United States has had a relatively recent history. Although the first interchange operation performed by the airlines began back in 1940, considerable recognition of interchange, as an effective and desirable method of providing new through service without basically changing the route structures of the air carriers, has only become evident in the past several years.


DOMESTIC INTERCHANGE ROUTES
JUNE 1954
SEATTLE
PORTLAND
SAN FRANCISCO
OAKLAND
LOS ANGELES
SAN DIEGO
PHOENIX
TUCSON
DENVER
COLORADO SPRINGS
EL PASO
AMARILLO
WICHITA
TULSA
OKLAHOMA CITY
FT. WORTH
DALLAS
HOUSTON
SAN ANTONIO
KANSAS CITY
ST. LOUIS
FT. SMITH
LITTLE ROCK
SHREVEPORT
MEMPHIS
BIRMINGHAM
NEW ORLEANS
MILWAUKEE
DETROIT
TOLEDO
CLEVELAND
BUFFALO
NEW YORK
PITTSBURGH
COLUMBUS
INDIANAPOLIS
DAYTON
CINCINNATI
WASHINGTON
LEXINGTON
KNOXVILLE
CHATTANOOGA
ATLANTA
MACON
SAVANNAH
JACKSONVILLE
ORLANDO
TAMPA
ST. PETERSBURG
WEST PALM BEACH
MIAMI
INTERCHANGE CARRIERS
1. DELTA-C & S/TWA
2. AMERICAN/DELTA-C & S
3. CAPITAL/NATIONAL
4. AMERICAN/DELTA-C & S/NATIONAL
5. AMERICAN/CONTINENTAL
6. BRANIFF/EASTERN
7. BRANIFF/EASTERN
8. BRANIFF/CONTINENTAL
9. DELTA-C & S/TWA
10. BRANIFF/UNITED*
11. CONTINENTAL/UNITED*
* TEMPORARILY SUSPENDED

Since the initial interchange experiment in 1940, the development of interchange service has progressed through three periods of relatively different rates of growth. War conditions restricted interchange operations in the 1940-1945 period. In the remainder of the decade, the benefits of interchange service began to receive recognition, and several interchange operations were inaugurated. It has been in the years since 1950, however, that the development of interchange service —encouraged by the Civil Aeronautics Board—has made its greatest advances.

Early Experiences and War-time Restriction, 1940-1945

The earliest airline experience with interchange service dates back to the opening years of World War II, when this country was yet a neutral nation. In the summer of 1940, United Air Lines and Western Air Express began providing one-plane overnight sleeper service between New York and Los Angeles by interchanging aircraft at the connecting point, Salt Lake City. War conditions subsequently discouraged the operation, however, and it was terminated within several months after the Japanese attack at Pearl Harbor. Although the Civil Aeronautics Board recognized interchange of equipment as a possible means of providing new through service in several route proceedings in 1944 and 1945, little further attention was given interchange during the war years.

United-Western interchange at Salt Lake City. On March 17, 1939, United Air Lines, a major transcontinental trunkline, and Western Air Express (now known as Western Air Lines), a regional carrier linking Southern California to the Mountain and North Central states, entered into an agreement to provide one-plane overnight sleeper service between New York City and Los Angeles by interchanging aircraft at the connecting point, Salt Lake City.[1] At that time, although United provided direct service between New York City and San Francisco, it was not authorized to serve Los Angeles directly from the East; however, it did connect with Western's route at Salt Lake City to provide two-plane service between Southern California and the eastern cities on its route. The required approval of the five-man regulatory board of the Civil Aeronautics Authority[2] was received in June of the following year.[3] Overnight one-plane through service over the connecting routes of the two carriers was subsequently inaugurated on August 20, 1940.[4] Although unqualified success could not be claimed for this in-

[1] *United A. L.-Western A. E., Interchange of Equipment,* 1 CAA 723 (1940). The agreement was filed with the Civil Aeronautics Authority for approval on March 20, 1939.

[2] This regulatory body became the present-day Civil Aeronautics Board on June 30, 1940, as a result of President Roosevelt's Reorganization Plans Nos. III and IV, printed as H Doc. Nos. 681 and 692, 76th Cong., 3d sess., and Public Resolution No. 75, 76th Cong., 3d sess.

[3] *United A. L.-Western A. E., Interchange of Equipment, ibid.*

[4] Brief for United Air Lines, Inc., submitted to Albert E. Beital, Examiner, in the *Western Air Lines, Inc., et al., Denver-Los Angeles Service* case on March 8, 1944, p. 31.

itial interchange, the two airlines provided the through sleeper service until the emergency conditions which confronted the air transportation industry, as a result of United States' entrance into World War II, discouraged continued operation. On May 27, 1942, one year and nine months after the service had begun, the interchange agreement between United and Western was terminated.[5]

Although the Civil Aeronautics Board acknowledged the possibility of a future need for the interchange of flight equipment at Chicago, so as to provide through service between the Twin Cities (and points west thereof), and New York, in a route application case decided in 1941,[6] the United-Western sleeper service was the only interchange service operated during the early forties. Several days after the United States entered the War, the Civil Aeronautics Board took action that sharply curtailed all planning along the lines of immediate expansion of air service through route extensions or interchange agreements. On December 12, 1941 the Board announced in a memorandum to the air carriers that all route proceedings would be temporarily suspended after the following day in order to enable the carriers and the Board to devote their immediate and complete attention to the emergency demands growing out of the War. For the ensuing eight months, the Board considered only those cases in which the needs of national defense were of paramount interest, and it considered those cases only on a temporary basis. But on August 29, 1942 the Board resumed proceedings in which hearings had been held prior to the suspension.[7] And in the following summer, convinced that the war effort would no longer be jeopardized by the consideration of applications involving new service, the CAB terminated its suspension policy regarding route proceedings.[8]

Termination of the suspension of route proceedings brought forth applications from the air carriers for new routes, but not voluntary interchange proposals. Nevertheless, Board recognition of interchange of flight equipment as a method of providing through service appeared in several route proceedings.

In November 1944, when granting Western Air Lines a certificate of public convenience and necessity authorizing service between Los Angeles and Denver, the Board pointed out the possibility of providing additional one-plane through service from Los Angeles to the East by

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[5] *Ibid.*

[6] *Northwest Airlines, et al., Additional Service to Canada*, 2 CAB 641 (1941). In denying Northwest Airlines' application for a certificate of public convenience and necessity extending its route east from Chicago to New York City, the Board stated, "As the through traffic between the Twin Cities and points west thereof on the one hand and New York City on the other increases, it may appear increasingly desirable to avoid the inconvenience of changing planes at Chicago. The Board must take cognizance of the fact, however, that such inconvenience might at any time be obviated at no expense to the taxpayers by interchange of equipment at Chicago. . . ."

[7] *Annual Report of the CAB*, 1942, (Washington: GPO, 1943), pp. 20-21.

[8] *Annual Report of the CAB*, 1943, (Washington: GPO, 1944), p. 7. The suspension policy was terminated on June 21, 1943.

means of interchange of equipment between Western and United Air Lines at Denver.[9] Toward the end of the same year, interchange again appeared in a route application case, when one of the members of the Board, in a dissenting opinion, suggested interchange as a way of providing single-plane service and at the same time avoiding route duplication.[10]

Just prior to the end of the War, the Board once again suggested interchange service when handing down a decision in a route case. In the *Great Lakes-Florida* case, the Board acknowledged that, in establishing a Detroit-Miami route by extending Eastern Air Lines route from Columbia, S. C., to Detroit, it was subjecting traffic previously transferred between Delta Air Lines and Transcontinental and Western Air (TWA) [11] at Cincinnati to diversion. The Board further indicated that it would look favorably upon a Delta-TWA interchange of equipment at Cincinnati and expressed a belief that such a combined service would succeed in retaining a substantial share of the Detroit-Florida traffic. The Board also considered the possibility of interchange between Capital Airlines and National Airlines at Washington for Detroit-Miami through service since Eastern was being made competitive with Capital at Detroit, Cleveland, and Akron.[12] The attitude of the Board in advocating interchange service in this proceeding differed noticeably from that reflected in earlier cases where the Board had found interchange to be desirable. Whereas the Board suggested interchange of equipment when denying route extensions in earlier cases,[13] in this proceeding the Board granted the route extension to provide one-plane through service and then suggested that interchange be used by the carriers from whom traffic would be diverted in order to enable them to retain a share of it. A consistent CAB policy on interchange service was yet to be established when the War ended.

Post-war Recognition and Service Inauguration, 1946-1949

The immediate post-war period was one of great expansion for the airlines. Expectations of an unprecedented volume of post-war passenger traffic led to optimism that was shared by the CAB and airline managements alike. New routes, new four-engine aircraft, and new

[9] *Western Air Lines, Inc., et al, Denver-Los Angeles Service,* 6 CAB 212 (1944). In denying a route extension to United, the Board dismissed United's contention that additional through service between the East and Los Angeles should be provided by extending its route from Denver to Los Angeles with the argument that interchange of equipment at Denver would provide the same benefits.

[10] *Northwest Airlines, Inc., et al., Chicago Milwaukee-New York Service,* 6 CAB 244 (1944). It is interesting to note that the CAB certificated Northwest Airlines between the Twin Cities and New York City via Milwaukee and Detroit, in this case; this action was in direct contradiction to the Board's position several years earlier, when it denied Northwest a route extension to New York stating that interchange at Chicago would be available to take care of any future traffic needs for through service between the Twin Cities, and points west thereof, and New York, *supra.*

[11] Now known as Trans-World Airlines.

[12] *Eastern A. L., et al., Great Lakes-Florida,* 6 CAB 429, 439 (1945).

[13] *Northwest Airlines, et al., Additional Service to Canada,* 2 CAB 627 (1941); and *Western Air Lines, Inc., et al., Denver-Los Angeles Service,* 6 CAB 199 (1944).

schedules greatly increased the capacity of the airlines. During such a period of expansion, when route awards were being made rather freely and route duplication did not yet draw forth the condemnation it was to receive several years later, one would expect the role of interchange service to be minor. And such it was. Nevertheless, it is to this early post-war period that the beginning of the present-day route pattern of interchange service can be traced.

Several interchange services were inaugurated during the early post-war years from 1946 through 1949.[14] Of greater significance than these initial operations, however, was the change in the CAB's attitude toward route expansion which took place toward the end of the period. The "over-expansion" of airline capacity in the immedate post-war period, which culminated in financial losses for the industry in 1947 and 1948, caused the Board to adopt a restrictive attitude toward the authorization of new routes and to encourage the use of interchange of equipment to provide new through service. This new policy subsequently resulted in the addition of a considerable amount of new interchange service; however, at the end of 1949, interchange still played only a minor role in the total service picture. The daily amount of capacity provided in interchange service was less than one million scheduled seat-miles or only three per cent of the airlines' total as 1949 drew to a close – Table 4.

Pan American-Panagra interchange at Balboa. The first post-war interchange service to be inaugurated was in the field of international air transportation, rather than domestic. In the early post-war period, the management of Panagra (Pan American-Grace Airways), a U. S. certificated carrier providing service solely within South America, realized that it could not even hope to get a route extension which would give Panagra direct access to the U.S. market. Pan American Airways, which owns half of Panagra's stock, would not permit the airline to file for a new route that would be directly competitive with Pan American's service.[15] The only other alternative open to Panagra was interchange. In July 1946, Pan American and Panagra signed an agreement providing for interchange of flight equipment at Balboa, Canal Zone. The agreement stipulated that Pan American would charter aircraft operated by Panagra into Balboa from Lima, Peru, or points further south along its route, for operation in Pan American's scheduled services from Balboa to Miami.[16] This interchange arrangement brought Panagra's service into Miami and represented a compromise in its

[14] In 1947 Pan American and Panagra began Miami-Buenos Aires through service over Pan American's Miami-Balboa route and Panagra's Balboa-Buenos Aires (down the west coast of South America) route; in 1948 Delta and TWA began Detroit-Miami through service over TWA's Detroit-Cincinnati route and Delta's Cincinnati-Miami route; and, in 1949 Delta and American began West Coast-Miami through service over American's San Francisco/Los Angeles-Dallas route and Delta's Dallas-Miami route.

[15] Panagra's route extends from Balboa to Buenos Aires via various points on the west coast of South America; Pan American operates from Miami to Balboa, and thence to Buenos Aires via points on the east coast of South America.

[16] *Pan American-Panagra Agreement*, 8 CAB 50 (1947).

repeated attempts to gain a direct entrance for its flights into the United States.

The agreement received the CAB's approval on May 5, 1947, but in granting its approval the Board limited the life of the document to three years in order to permit later review of the agreement in the light of experience.[17] By early June this initial interchange service (in the post-war period) was in operation.[18] Pan American and Panagra sought reapproval and modification of the interchange agreement, as its life was running out in July 1949, but the CAB consolidated their application with a broader route investigation proceeding and granted only temporary approval pending a decision in the route case.[19] When the board finally handed down the awaited decision almost two years later, it instituted a new proceeding (*New York-Balboa Through Service Proceeding, infra.*) to consider interchange service between New York City and the west coast of South America via Miami and Balboa and simultaneously consolidated the Pan American-Panagra agreement with this new investigation, while once again temporarily extending its life.[20] Since a final decision in this later proceeding is yet to be handed down, Pan American and Panagra currently continue to operate their Balboa interchange service under the temporary agreement.

Delta-TWA interchange at Cincinnati. The first post-war domestic interchange service to be provided by United States carriers was inaugurated one year after the start of the Pan American-Panagra operation, although the signing of the interchange agreement by the two participating carriers, Delta Air Lines and TWA, actually preceded the signing of the Pan American-Panagra agreement by more than a month.[21]

As previously indicated, toward the close of World War II the CAB recommended in the *Great Lakes-Florida* case, *supra,* that Delta and TWA interchange equipment at Cincinnati in order to retain a share of the Detroit-Miami traffic. This pronouncement received serious consideration by the two carriers which culminated in their signing an interchange agreement in June, 1946. Board approval of the agreement was not forthcoming until December 1947,[22] however, and further delay in inaugurating the proposed service was experienced when Delta was authorized to serve New Orleans in January 1948.[23] Shortly after Delta received this route extension, Delta and TWA filed a supplemental agreement with the CAB which differed from the original interchange agreement, recently approved, in that it provided for a

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[17] *Ibid.*

[18] *Official Airline Guide*, July 1947, p. 20.

[19] CAB Order Serial No. E-3017, July 15, 1949.

[20] *National Route Investigation*, Docket No. 3500, *et al.*, CAB Order Serial No. E-5205, March 16, 1951.

[21] The Pan American-Panagra agreement carried a July 30, 1946 date; the Delta-TWA agreement, a June 13, 1946 date.

[22] *Transcontinental & Western Air, Inc.-Delta Air Lines, Inc., Interchange of Equipment*, 8 CAB 857 (1947).

[23] *Boston-New York-Atlanta-New Orleans Case*, 9 CAB 38 (1948).

one-plane operation between Detroit and New Orleans via Cincinnati, as well as between Detroit and Miami. When the CAB reopened the proceeding to consider only the Detroit-New Orleans interchange,[24] Delta and TWA went ahead with plans to inaugurate the approved Detroit-Miami operation and on June 1, 1948 began daily one-plane service.[25]

The Board finally disapproved the supplemental agreement providing for Detroit-New Orleans interchange service in July 1949, on the grounds that traffic demand didn't warrant the service and the diversional effect on Chicago and Southern Air Lines would outweigh the slight benefits to be gained.[26] Consequently, the Delta-TWA interchange connecting Detroit and intermediate points on TWA's route to Cincinnati with Miami and intermediate points on Delta's route to Cincinnati continued to be the only domestic interchange service provided, as the summer of 1949 drew to a close.

Route system expansion influences growth of interchange. As mentioned previously, anticipation of a greatly increased market for air travel in the immediate post-war period led to an optimistic expansion of the airlines' capacity which hindsight later labeled "overexpansion."

As shown in Table 1, at the end of 1945 the domestic scheduled airlines had 414 aircraft in service. By the end of 1946, this figure had jumped to 661. By the end of 1948, it had more than doubled, reaching a total of 858. Whereas the airlines were operating over a route system averaging slightly less than 48,000 unduplicated miles in 1945, by the end of 1948 that figure had jumped to over 68,000 miles. More significant than either of the foregoing comparisons, however, is the meteoric rise in available seat-miles flown, for it reflects increased capacity provided by larger, faster aircraft operating many new schedules, as well as increased capacity due to the larger number of aircraft and the expanded route structure.

TABLE 1

SELECTED OPERATIONAL DATA OF THE DOMESTIC SCHEDULED AIRLINES, 1945-1948

Year	*Route-miles Operated During 4th Quarter*	*No. of Aircraft in Service at End of Year*	*Available Seat-miles Flown* (000)
1945	47,960	414	3,818,059
1946	52,745	661	7,574,433
1947	60,870	794	9,307,896
1948	68,111	858	11,441,645

Source: Air Transport Assoc. of America, *Air Transport Facts and Figures*, 14th ed., 1953.

Whereas the airlines flew slightly in excess of 3.8 billion seat-miles in 1945, by 1948 this figure had almost tripled to 11.4 billion. During

[24] CAB Order Serial No. E-1634, May 28, 1948.

[25] Brief of Delta Air Lines, Inc., submitted to Examiner J. Earl Cox in the *Southern Service to the West Case*, November 7, 1949, p. 26.

[26] *Transcontinental & Western Air, Inc.-Delta Air Lines, Inc., Interchange Agreement* (*Reopened Proceedings*), 10 CAB 527 (1949).

such a period of "free and easy" expansion, interchange of equipment to provide new through service was a rather neglected alternative to route expansion. An airline management was not prone to voluntarily enter into an interchange agreement and share through traffic with another carrier, when it could get authorization to provide the entire through service itself.[27]

But when the airlines suffered an operating loss of approximately $22,000,000 in the fiscal year ending June 30, 1947[28] doubts were raised as to the wisdom of the attitude toward expansion that had been shared alike by the airlines and the CAB. The Chairman of the CAB sounded a note of caution for airlines with further plans for route expansion saying, ". . . the real possibilities for improved air service in the next decade lie less in the extension of routes than in the development of combined through services that will increase the scope of any particular carrier." [29] Nevertheless, during the remainder of the year, although given some consideration in a couple of CAB cases,[30] interchange service continued to play a minor role. However, when it became undeniably apparent in early 1948 that the airlines were passing through a serious financial crisis, and that one of the important reasons for this unfortunate state of events was the great expansion of routes engendered by over-optimism about the volume of immediate post-war traffic,[31] interchange service began to receive a greater amount of attention.

By autumn of 1948 the CAB had exhibited a more restrictive attitude toward the authorization of new routes and had begun to actively encourage the use of interchange of equipment to provide new through service. In the *Kansas City-Memphis-Florida Case*[32] it instituted a proceeding (*Through Service Proceeding, infra.*) to investigate the possibilities of interchanging aircraft at St. Louis and Memphis in order to benefit through traffic moving between Kansas City and Denver, on the one hand, and Miami, on the other. In addition, it instituted a proceeding in 1948 to determine whether new single-plane service between southeastern points and the West Coast should

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[27] On September 30, 1947 in a dissenting opinion, Chairman Landis denounced the CAB's willingness to extend routes as the reason for the limited development of interchange service. *Northwest Airlines, Inc., et al., Detroit-Washington Service*, 8 CAB 525 (1947).

[28] *Survival in the Air Age*, A Report by the President's Air Policy Commission (Wash.: G.P.O., 1948), p. 99.

[29] James M. Landis, "Mutual Problems on Air Transport Service," an address before the American Municipal Association at New Orleans on November 6, 1947, p. 5 of mimeographed copy.

[30] *Northwest Airlines, Inc., et al., Detroit-Washington Service*, 8 CAB 525 (1947); and *Middle Atlantic Area Case, Pittsburg Service*, 8 CAB 541 (1947). In denying an extension of Eastern's service to Pittsburgh in the latter case, the CAB indicated that Pittsburgh-Florida single-plane operation would have been possible by interchange of equipment with Pennsylvania Central Airlines (now Capital Airlines) at Washington, D. C., for Eastern Air Lines; at Norfolk, Va., for National Airliners; and at Knoxville, Tenn., for Delta Airlines (now Delta-C & S Airlines).

[31] *Survival in the Air Age, ibid.*

[32] 9 CAB 401 (1948).

be established by equipment interchange between carriers already serving the area in question, and consolidated it into the same case with route applications of ten carriers who had been seeking new southern transcontinental routes (*Southern Service to the West Case, infra.*)[33]

Delta-American interchange at Dallas. Recognizing the Board's changed attitude toward new routes and anticipating an ill fate for the applications for southern transcontinental routes, Delta Air Lines and American Airlines entered into an agreement on November 15, 1948 to provide one-plane through service between Miami, on the one hand, and Los Angeles, Oakland, and San Francisco, on the other, via the interchange point, Dallas. The CAB approved the agreement on August 30th of the following year, but qualified its approval as temporary, pending final disposition of the *Southern Service to the West Case, infra.*[34] Delta and American promptly inaugurated once-daily service in both directions between San Francisco and Atlanta, Los Angeles and Atlanta, and Los Angeles and Miami.[35]

After the successful start of this second domestic interchange service, no new interchange operations were started and no new interchange agreements were approved during the balance of the year. As 1949 drew to a close, the U. S. was spanned by two interchange routes over which almost 5,700 route-miles (nearly 8 per cent of the industry total) were being operated daily. The Southeastern part of the U. S. was linked to the industrial North by the Delta-TWA interchange at Cincinnati and to the West Coast by the Delta-American interchange at Dallas. Twenty-nine cities, or 5.5 per cent of all cities served by scheduled air carriers were receiving interchange service.[36] Nevertheless, the actual airlift offered to the public daily by interchanges was less than one million scheduled seat-miles, or only 3 per cent of the scheduled airline industry's total.[37]

CAB Encouragement and Expansion of Interchange Service, 1950-1953

Although no new interchange services were inaugurated in late 1949 and during the entire year of 1950, this lull in interchange activity was more apparent than real for two important interchange cases were under consideration by the CAB. These two significant cases, *viz., Through Service Proceeding and Southern Service to the West Case, infra,* were to result in the addition of four new interchange operations in the eight month period from May 1951 to January 1952 and to give the growth of interchange service the greatest impetus in its brief history. Five more interchange operations also were inaugurated in the

[33] CAB Order Serial No. E-2033, September 29, 1948.
[34] *Delta Air Lines, Inc.-American Airlines, Inc., Interchange of Equipment,* 10 CAB 761 (1949).
[35] *Official Airline Guide,* October, 1949, pp. 61, 103. Service started in September.
[36] Table 3.
[37] See Table 4.

1950-1953 period.[38] Combined these nine interchanges accounted for the addition of over 19,000 daily route-miles and more than 2,000,000 daily seat-miles of interchange service. Interchange was no longer a unique experiment in the airline industry. Nine out of the thirteen domestic scheduled trunklines participated in one or more of eleven interchange operations. These eleven interchange operations served a total of 580 cities and offered about 63,000,000 seat-miles daily to the traveling public.[39]

Capital-National Interchange at Washington. The two major cases cited in the paragraph above made the greatest contributions to the development of interchange service and CAB policy relative to it in the early 1950's. Nevertheless in keeping with the chronological order, prior attention will be given to the Capital-National interchange at Washington, D. C.

Although the Capital-National interchange began in the autumn of 1951, the historical background leading up to the service inauguration dates back to the early post-war period. When the CAB certificated Eastern Air Lines to provide service to the Southeast from Detroit, Cleveland, and Akron in the *Great Lakes-Florida* case in July 1945, it also considered the possibility of interchange between Capital Airlines and National Airlines to improve their connecting service at Washington, since Eastern was being made competitive with Capital in three cities.[40] While recognizing that some of Capital's passenger traffic would be diverted by Eastern's through service to the three cities, the Board expressed hopeful anticipation that Capital would be able to retain some of the Detroit-Florida business through connections with National's service to the South. Experience proved the CAB's expectation to be incorrect, however, and Capital soon lost substantially all of its earlier participation in the Florida traffic to Eastern's one-plane service.[41]

In an effort to recapture some of the passenger traffic lost to Eastern, Capital and National entered into an interchange agreement on March 12, 1948 to provide one-plane through service between Detroit and other Capital cities northwest of Washington, on the one hand, and Miami and other National cities south of Washington, on the other, via the interchange point, Washington, D. C. The Board approved the agreement the following month.[42] Shortly thereafter Eastern filed a petition to void the agreement, but the CAB upheld its earlier decision, indicating that Eastern had advanced no new proof that it would suffer substantial diversion or any new matters

[38] A listing of interchange services by date of inauguration appears in Table 5.
[39] See Tables 2, 3, and 4.
[40] *Eastern A. L., et al., Great Lakes-Florida*, 6 CAB 440 (1945). The Board also suggested the Delta-Twa interchange at Cincinnati in this case. See *Delta-TWA interchange at Cincinnati, supra.*
[41] *Capital Airlines, Inc.-National Airlines, Inc., Interchange of Equipment*, 10 CAB 243 (1949).
[42] *Ibid.* p. 254. The agreement was approved April 28, 1949.

which would warrant changing the original finding of the Board.[43]

Although Capital and National were now officially cleared to provide the new interchange service, National's attention was diverted to a pressing dismemberment case which threatened its very existence, and inauguration of interchange service was further delayed.[44] Finally, however, in April 1951 Capital and National began operating twice-daily service in each direction between Detroit and Miami via the interchange point Washington.[45] Detroit-Miami traffic was now served by two interchange operations, *viz.*, the Delta-TWA interchange at Washington, as well as by Eastern's one-plane service. During the same Cincinnati and the Capital-National interchange at Washington, as well as by Eastern's one-plane service. During the same month plans were also made to provide Miami-Kansas City and Miami-Denver passenger traffic with interchange service, when the Board approved two interchange arrangements it had recommended in the *Through Service Proceeding* case.

Through Service Proceeding. This proceeding, the expressed purpose of which was to investigate the possibilities of interchange service between Rocky Mountain and Midwest cities, on the one hand, and cities in the Southeast, on the other, grew out of the *Kansas City-Memphis-Florida Case,* in which a second and final decision was handed down in July 1948.[46] An earlier decision rendered by the CAB in September 1947 had certificated Chicago and Southern Air Lines to provide service between Kansas City and Memphis via Springfield, Mo.[47] In response to various petitions and motions filed by parties to the proceeding,[48] the Board reopened it in the following November[49] for ". . . the purpose of receiving in evidence the September 1946 Air Traffic Survey, and for reargument and reconsideration of the entire case upon the record as thus supplemented . . ."[50] That Chicago and Southern could provide service adequate to meet the needs of local traffic between Kansas City and Memphis was not challenged by the petitioners. They contended that the CAB's recent traffic survey

[43] *Capital Airlines, Inc.-National Airlines, Inc., Equipment Interchange,* 10 CAB 564 (1949).

[44] *National Route Investigation,* Docket No. 3500, *et al.,* CAB Order Serial No. E-5205, March 16, 1951. Due primarily to serious accidents in the fall of 1947 which resulted in the grounding of National's DC-6 aircraft from November, 1947 to April, 1948 National's peak traffic season, and to National's labor strike in 1948, the airline was in a precarious financial position. On September 28, 1948 the Board instituted a proceeding to determine whether certain transfers of National's routes and property would be in the public interest, seeking a solution to National's dilemma in dismemberment. However, National recovered much of its financial strength in 1949 and 1950, and in March 1951, the Board terminated the dismemberment case.

[45] *Official Airline Guide,* April 1951, p. 128. Service was extended beyond Detroit to Milwaukee and Minneapolis/St. Paul in January 1954.

[46] *Kansas City-Memphis-Florida Case,* 9 CAB 401 (1948).

[47] *Kansas City-Memphis-Florida Case,* 8 CAB 554 (1947).

[48] Delta Air Lines, Eastern Air Lines, Mid-Continent Airlines, and various cities.

[49] CAB Order Serial No. E-1025, November 28, 1947.

[50] *Kansas City-Memphis-Florida Case, op. cit.,* p. 402.

showed the need for through service to be greater than the need for local service, and they further maintained that the Board had erred in selecting a carrier that would not be able to offer single carrier service to the through traffic moving to or from cities beyond Kansas City and Memphis, the terminals of the route given to Chicago and Southern.[51]

Nevertheless, the Board reaffirmed its earlier decision to award the route to Chicago and Southern; however, it also acknowledged that the needs of the through traffic moving through St. Louis and Memphis from the west and north to the southeast warranted an investigation to determine the desirability of providing interchange service through either or both of the two gateways.[52] In accordance with this opinion the Board instituted a proceeding concurrently with its decision in the *Kansas City-Memphis-Florida Case* which was docketed as the *Through Service Proceeding*.[53]

On November 13, 1950 the Board issued its opinion and decision in the *Through Service Proceeding Case*, recommending that interchange service connecting Kansas City-Omaha and Miami via St. Louis be provided by Mid-Continent Airlines and Eastern Air Lines, and that similar service between Denver and Miami via Memphis be provided by Braniff Airways and Eastern Air Lines.[54] In taking this unprecedented action of "requesting" carriers to enter into interchange agreements, the Board indirectly served notice on the scheduled airlines that interchange of equipment was to play a significant role in the Board's thinking on the future development of the air service pattern. This was the first time the Board had really taken the initiative in proposing interchange of equipment to provide new one-plane through service. Previously it had merely suggested the possible use of interchange and had reserved its judgment for determining whether or not interchange agreements conceived and proposed by the carriers themselves should be approved.

The CAB also declared in this important case that it had the authority to compel the interchanges desired, but chose only to recommend that the desired services be inaugurated, and ordered that the record in the proceeding be kept open for a period of sixty days to permit the carriers involved to negotiate and file interchange agreements with the Board.[55]

Agreements between Mid-Continent and Eastern and Braniff and Eastern were subsequently filed and received Board approval in April 1951.[56] The interchange services authorized were not immediately in-

[51] *Ibid*, p. 403.
[52] *Ibid*, p. 408.
[53] CAB Order Serial No. E-1814, July 23, 1948.
[54] *Through Service Proceeding*, 12 CAB 278 (1950).
[55] *Ibid*, pp. 277, 279.
[56] On December 13, 1950 the Board issued CAB Order Serial No. E-4932 extending the time for filing agreements to February 15, 1951. Mid-Continent and Eastern filed their agreement on January 10, 1951, and Braniff and Eastern filed theirs on

augurated, but in December 1951 Braniff and Eastern began once-daily round trip service between Denver and Miami via the interchange point, Memphis.[57] Mid-Continent and Eastern inaugurated once-daily round trip service between Kansas City and Miami via the interchange point, St. Louis, in the following month.[58]

Southern Service to the West Case. Probably even more significant and far reaching in its effects than the Board's decision in the *Through Service Proceeding* late in 1950, was the Board's action in the *Southern Service to the West Case* decided on January 30th of the following year.[59]

This proceeding had been instigated to determine the need for through service between cities in the southeastern and southern parts of the United States and cities on the West Coast.[60] It included both new route applications and a broad interchange investigation and achieved great significance as an interchange case since out of it came the only official general policy statement on interchange service that the CAB has issued to this day.

In denying the applications of six airlines for new routes between the southeastern part of the United States and south Texas points, on the one hand, and points in the Southwest and California, on the other hand, the Board reasoned that, in view of: (1) the large expansion of the domestic route pattern since the enactment of the Civil Aeronautics Act of 1938; (2) the enormous increase in transport capacity during the post-war years; (3) the failure of the post-war traffic to reach the level which was anticipated by the industry and CAB alike; and (4) the critical economic situation which confronted the industry during 1947 and 1948, when the remainder of the American economy was in a healthy condition:

> . . . the conclusion would seem too inescapable that, in the light of present facts and conditions, the difficulty of reconciling any material route expansion with the statuatory mandate looking toward the development of an economically sound air transportation system would seem to present . . . a major, if not insurmountable, task and that under such circumstances serious consideration should be given to interchange operations as an alternative measure for meeting the future air service needs.[61]

The Board then went on to lay down certain principles or standards which it believed would be useful as guides to judgment in future interchange cases, as well as the one at hand, stating that:

> . . . interchanges which would best satisfy the public interest

February 5, 1951. Both were approved by CAB Order Serial No. E-5299, issued April 17, 1951.

[57] *Official Airline Guide*, December 1951, pp. 112, 174.

[58] *Official Airline Guide*, January 1952, pp. 174, 218.

[59] *Southern Service to the West Case.* Docket No. 1102, *et al.*, CAB Order Serial No. E-5090, January 30, 1951.

[60] *Ibid.*, mimeographed opinion, p. 1. Prehearing conferences began in May 1948.

[61] *Ibid.*, pp. 25-26.

> would be those which would cause the minimum interference with the existing route pattern and this . . . would favor interchanges that were not dependent upon new route extensions with their attendant cost and competitive implications to implement them. It would also seem to be a basic requirement that sound interchanges should provide improved through service over reasonably direct routes. And finally . . . the interchange arrangement which would be most consistent with the public interest . . . would leave substantially undisturbed the historical participation of various existing carriers in the traffic movement to be served, and would not cause undue diversions.[62]

In accordance with the policy so stated in its opinion, the Board denied the application of American Airlines, Eastern Air Lines, Delta Air Lines, Continental Air Lines, Braniff Airways, and National Airlines for new routes. At the same time the Board officially sanctioned the interchange agreement under which Delta and American had been operating (see *Delta-American interchange at Dallas, supra*). Insofar as it provided for through service between the West Coast and Atlanta (the two carriers had been operating the interchange service to Miami under temporary approval) and between the West Coast and New Orleans via Dallas.[63] It further found the public interest to require interchange between National, Delta, and American over a Miami-New Orleans-Dallas-West Coast route[64] and between Braniff, Continental, and American over a Houston-San Antonio-El Paso-West Coast route.

As in the *Through Service Proceeding, supra,* the Board again acknowledged its authority to compel interchange operations by appropriate order, but chose to call upon the carriers involved to present voluntary interchange agreements for the Board's approval;[65] furthermore, in accordance with this action, the Board once again held open the record in the proceeding for a period of sixty days to permit the carriers to work out and file interchange agreements.[66]

Braniff, Continental, and American filed an interchange agreement on March 9, 1951; and National, Delta, and American filed theirs a week later on March 16. Both agreements were subsequently approved by the Board on May 1, 1951.[67] National, Delta, and American began operating their southern transcontinental interchange service immediately,[68] but the Braniff- Continental-American interchange service never materialized.

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[62] *Ibid.*, pp. 32-33.

[63] Delta was later authorized to serve New Orleans, Birmingham, and Atlanta on the same flight. CAB Order Serial No. E-5231, March 22, 1951.

[64] Delta and American had been providing similar interchange service between the West Coast and Miami via Atlanta, a more circuitous route, under their temporary approval.

[65] *Southern Service to the West Case, op. cit.*, p. 32.

[66] *Ibid.*, p. 55.

[67] CAB Order Serial No. E-5337, May 1, 1951.

[68] *Official Airline Guide*, May 1951, p. 85. They offered once-daily round trip service between Los Angeles and Miami via San Diego, El Paso, Dallas, New Orleans, and Tampa, and between San Francisco and Miami via Dallas, New Orleans, and Tampa.

On July 13, two months later, the Board reversed its former position in regard to the Braniff-Continental-American interchange and revoked its approval of the agreement.[69] In explaining its unusual action, the Board stated that it had reconsidered its earlier decision and had concluded that in certain respects it should be modified.[70] The modification consisted primarily of (1) disapproving the Braniff-Continental-American interchange agreement; (2) finding a Continental-American interchange between Houston and the West Coast via San Antonio and El Paso to be in the public interest; (3) amending Continental's certificate to extend its service from San Antonio to Houston on through flights between the later city and points west of El Paso on American's route operated under an interchange arrangement; and, (4) to reopen the proceeding for further argument on and consideration of whether it would be in the public interest to provide through service from Miami via Houston and Amarillo to points west thereof on TWA's route to the West Coast by interchange of equipment between Eastern, Braniff, and TWA, and whether Eastern's certificate should be amended to authorize it to engage in trans-Gulf operation under the suggested interchange arrangement.[71]

In reversing its stand on the Braniff-Continental-American interchange, the Board now concluded that it was unsound and that:

> . . . such an arrangement in which Braniff's participation and financial stake is relatively so small [actually Braniff was confronted with the problem of short-hauling itself over the Houston-San Antonio segment as against moving Houston-West Coast traffic over its Houston-Dallas route to connect with American or over its Houston-Amarillo route to connect with TWA] does not offer that prospect for development and continued success originally envisaged.[72]

In apparent contradiction to the interchange "principle" laid down in the first CAB opinion and decision in this case, which held interchange dependent upon route extensions in disfavor, *supra*, the CAB now had extended Continental's route from San Antonio to Houston, albeit only for interchange flights, and had indicated a favorable attitude toward the proposed Eastern-Braniff-TWA interchange, which also depended upon a route extension, by agreeing to reconsider it. This capricious action by the Board can only be explained by recognizing that the Board which handed down the second decision was not the same Board that handed down the initial decision and opinion, containing the interchange policy statement and principles. Of the five members of the CAB which handed down the second decision on July 13, 1951, only two had been members of the Board in the previous

[69] *Southern Service to the West Case*, Dock. No. 1102, et al., CAB Order Serial No. E-5531, July 13, 1951, Supplementary Opinion on Reconsideration, mimeographed copy, p. 12.

[70] *Southern Service to the West Cast, op. cit.*, p. 5.

[71] *Ibid*, pp. 12-13.

[72] *Ibid.*, p. 7.

January when the initial decision had been rendered.[73] Thus the change in Board attitude can be attributed primarily to a change in membership. Such complete reversals of Board policy contribute little to foster stability within the airline industry. The Board's supplemental opinion completely invalidated the earlier policy statement and "principles" laid down to guide future action in interchange cases, and left the airlines confused.

Immediately after the CAB issued its supplemental opinion, Continental and American filed an interchange agreement. Board approval came on July 24, 1951.[74] The carriers began once-daily service in each direction between Houston and Los Angeles via San Antonio and El Paso in October. Similar service between Houston and San Francisco via the same intermediate points was added in the following month.[75] A second daily flight between Houston and Los Angeles was added in November 1952. This added "local flight" served intermediate points San Antonio, El Paso, Douglas, Tucson, Phoenix, and San Diego.[76]

In February 1952, seven months after it had reopened the proceeding to reconsider an Eastern-Braniff-TWA interchange operation, the Board handed down its second supplemental opinion in the *Southern Service to the West Case* and found the provision of through one-plane service by means of interchange of aircraft between Eastern (from Miami to Houston via Tampa), Braniff (from Houston to Amarillo via Dallas or Ft. Worth), and Trans World Airlines (from Amarillo to San Francisco via Los Angeles) to be in the public interest. In addition it authorized Eastern to operate across the Gulf of Mexico from Tampa to Houston for one year only (expiration date was April 11, 1953) subject to the condition that service over that segment of Eastern's route would be limited to through flights operated in conjunction with Braniff and TWA, pursuant to an interchange agreement providing for through service by interchange of aircraft between Miami and points west of Amarillo.[77]

The three carriers subsequently filed an interchange agreement which the Board approved on April 7, 1952.[78] However, on the folowing day National Airlines filed a petition in the U. S. Court of Appeals for the District of Columbia Circuit seeking judicial review of the CAB's orders which had found the Eastern-Braniff-TWA interchange to be in the public interest, certificated Eastern for trans-Gulf operation in conjunction with the interchange service, and approved the interchange agreement filed by the three carriers. On April 10th the Court issued an injunction staying inauguration of service under the

[73] In January 1951 the Board was composed of Chairman Rentzel and members Ryan, Lee, and Jones with one vacancy. By July 1951, Nyrop had replaced Rentzel as Chairman, Gurney had replaced Jones, and Adams had filled the vacancy.

[74] CAB Order Serial No. E-5546, July 24, 1951.

[75] *Official Airline Guide*, October 1951, p. 149; November 1951, p. 151.

[76] *Official Airline Guide*, November 1952, p. 178.

[77] *Southern Service to the West Case*, Docket No. 1102, *et al.*, CAB Order Serial No. 6105, February 11, 1952, Supplemental Opinion, mimeographed copy, pp. 25-26.

[78] CAB Order Serial No. E-6297, April 7, 1952.

interchange agreement, pending hearing of the case by the Court.[79]

Faced with the prospect of lengthy judicial review (and perhaps a decision unfavorable to the CAB), the Board backed down on its earlier decision, rescinded the orders in question, and reopened the *Southern Service to the West Case* for the purpose of conducting further hearings on the proposed Eastern-Braniff-TWA interchange and the amendment to Eastern's certificate which would authorize trans-Gulf operation in conjunction with the interchange service.[80] Subsequently, the Court of Appeals remanded the case to the CAB.[81] In December 1953, a year later, the Board reversed its position on the proposed Eastern-Braniff-TWA southern transcontinental interchange once again and withdrew its approval. Nevertheless, in the same decision it found a Houston-Miami interchange service over Eastern Air Lines' route from Houston to New Orleans and National Airlines' trans-Gulf route from New Orleans to Tampa and Miami to be in the public interest.[82]

Almost five years earlier (March 3, 1949), Eastern and National had filed an application for approval of a voluntary interchange agreement which included a Miami-Houston service via the interchange point, New Orleans.[83] Hearings had been held by the Board on this application as part of the proceedings in the *National Route Investigation* case with which it was first consolidated and from which it was later severed.[84] When the Board reopened the *Southern Service to the West Case*[85] in July 1951 for the further argument and consideration of the previously disapproved Eastern-Braniff-TWA transcontinental interchange service between Miami and the West Coast via New Orleans, Houston, and Amarillo, Eastern's interest in its proposed trans-Gulf interchange with National immediately waned. Several months later (October), when favorable CAB action on the Eastern-Braniff-TWA interchange seemed assured, Eastern submitted a letter to the CAB withdrawing its application for approval of the Eastern-National interchange and requesting that the proceeding be dismissed.[86]

Although Eastern's request for dismissal was not granted, the Board handed down a decision denying approval of the interchange agreement in February of the following year, stating that, ". . . without the enthusiastic support of both carriers, there can be no justification for . . . approval of the agreement."[87] The Board went on in its opinion

[79] CAB Order Serial No. E-6499, June 9, 1952.

[80] *Ibid.*, pp. 3-4.

[81] *American Aviation*, November 10, 1952, p. 72.

[82] *Reopened Southern Service to the West Case*, Docket No. 1102, *et al.*, CAB Order Serial No. E-7988, December 22, 1953.

[83] CAB Order Serial No. E-6873, October 15, 1952, footnote on p. 3.

[84] *National Route Investigation*, Docket No. 3500, *et al.*, CAB Order Serial No. E-5205, March 16, 1951. The application was consolidated on July 15, 1949 by CAB Order Serial No. E-3017 and severed on March 16, 1951, concurrently with the decision in the *National Route Investigation* case.

[85] CAB Docket No. 1102, *et al.*, CAB Order Serial No. E-5531, July 13, 1951.

[86] *National-Eastern Interchange Agreement*, Docket No. 3681, CAB Order Serial No. E-6106, February 11, 1952, mimeographed opinion, p. 3.

[87] *Ibid.*, p. 4.

to qualify the foregoing statement, lest it be construed to mean that compulsory interchange would never be a possibility, by adding that:

> . . . the fact that one party to an interchange agreement loses interest in the proposed service does not necessarily mean that the Board will automatically deny approval of the agreement. However, the willingness of the parties is a substantial factor to be considered in passing upon the agreement. And where, as here, there is a need for the development of new traffic in order to make the operation successful, the unwillingness of one party definitely tips the scale against approval of the agreement. [88]

The foregoing decision and opinion in the *National-Eastern Interchange* case were issued by the CAB on February 11, 1952, the same day during which the Board issued the supplemental opinion and decision in the *Southern Service to the West Case* which found the Eastern-Braniff-TWA transcontinental interchange to be in the public interest. Although the Board apparently had dealt the proposed National-Eastern interchange a final death blow by its action, subsequent developments in the *Southern Service to the West Case* gave it new life.

As indicated above, Eastern, Braniff, and TWA were prevented from inaugurating service on their authorized interchange route in April 1952, when National obtained a court injunction. Faced with lengthy litigation, the CAB revoked its previous order in June and reopened the case to reconsider the Eastern-Braniff-TWA interchange. With the whole question of additional interchange service between Florida and Texas open once again, National revived its application for a National-Eastern interchange service, and on October 15, 1952, the Board instituted a proceeding to investigate the proposed interchange service, and consolidated it with the *Southern Service to the West Case* for hearing and decision.[89]

Although the Board had previously denied approval of a National-Eastern interchange at New Orleans, because it did not have the enthusiastic support of both carriers, the Board now felt that such mutual enthusiasm was not essential, stating that:

> . . . we do not believe that the condition with respect to an expression of Eastern's willingness is necessary or appropriate, particularly in the circumstances of this proceeding. . . . It is clear that the Board's power to compel through service pursuant to Section 1002(i) of the [Civil Aeronautics] Act would be largely destroyed if the Board in this or any other proceeding should condition such a proceeding upon the willingness of one or more of the carriers involved.[90]

Once again the Board had reversed itself on a policy statement on interchange service. This time, however, the membership of the Board

[88] *Ibid.*, p. 5
[89] CAB Order Serial No. E-6873, October 15, 1952.
[90] *Ibid.*, p. 3.

had not changed between decisions; only the minds of the members had.

As mentioned above, the Board approved the Eastern-National interchange in December 1953 and disapproved the Eastern-Braniff-TWA interchange with which it had been consolidated for hearing.[91] Eastern, Braniff, and TWA immediately sought a reversal of the Board's decision. Nevertheless, in June 1954 the Board reaffirmed its earlier decision. At the same time, it tentatively approved a Braniff-TWA interchange at Amarillo, linking Texas and California points, and consolidated it for hearing with Continental Air Lines' application for renewal of its authorization to serve Houston, Texas on interchange flights between that point and California points.[92] In addition to reaffirming its previous approval of an Eastern-National interchange, the Board held the record open for 60 days to permit the two carriers to enter into and file for CAB approval an interchange agreement. Eastern and National were not disposed to take immediate action toward that end, however, and the interchange was not forthcoming.

New York-Balboa Through Service Proceeding. An important interchange proceeding still awaiting final decision by the CAB is the *New York-Balboa Through Service Proceeding*,[93] which had been instituted by the Board back in March 1951, concurrently with its decision in the *National Route Investigation* case.[94]

When the Civil Aeronautics Board initiated the National Investigation in January 1949, it indicated that the investigation would include such possibilities as interchange of equipment or merger of the financially sick National with another carrier, as well as the transfer of one or more of National's routes or segments.[95] Subsequently, however, National's operating record and financial condition improved and the CAB decided that the public interest no longer required a transfer of the whole or any part of the routes of National to any other carrier or carriers.[96] Consequently, on March 16, 1951, the CAB terminated its investigation of the routes and property of National, leaving the airline intact. At the same time, it instituted a proceeding, designated the "New York-Balboa Through Service Proceeding", which directed Pan American World Airways, Panagra, and National Airlines to show cause why the Board should not order a compulsory interchange operation between Pan American and National for through service between New York and Balboa to be provided by using Panagra's aircraft already being used in the Panagra-Pan American interchange operation. Applications for approval of interchange agreements

[91] *Reopened Southern Service to the West Case*, Docket No. 1102, *et al.*, CAB Order Serial No. E-7988, December 22, 1953.

[92] *Reopened Southern Service to the West Case*, Docket No. 1102, *et al.*, CAB Order Serial No. E-8466, June 25, 1954.

[93] Docket No. 4882.

[94] *National Route Investigation*, Docket No. 3500, *et al.*, CAB Order Serial No. E-5205, March 16, 1951.

[95] *Ibid.*, mimeographed opinion, p. 4.

[96] *Ibid.*, p. 9.

between National and Panagra and Eastern and Pan American, providing for interchange at Miami, both of which had been filed during the National Route Investigation proceeding, were consolidated with the new proceeding, as was an application for modification and extension of the Pan American-Panagra Through Flight Agreement (see *Pan American-Panagra interchange at Balboa, supra*).[97] Recognizing that a National-Pan American-Panagra interchange service would subject Latin American traffic via Eastern and Braniff to considerable diversion, the Board also included in the new proceeding the question of whether or not Braniff or Eastern should have their certificates amended to include service between Miami and Havana, and also why, in the event of such an amendment, a compulsory interchange between Eastern and Braniff to provide through service between New York and Balboa should not be ordered by the Board.[98]

A month later the Board opinioned that the proceedings would take a substantial period of time and that some through service should be provided in the interim. Consequently, it tentatively approved the National-Panagra interchange agreement and a supplement to the Pan American-Panagra Through Flight Agreement pending final decision in the *New York-Balboa Through Service Proceeding*.[99] The Board's action made possible through one-plane service using Panagra equipment from New York to Argentina over National's route from New York to Miami; Pan American's, from Miami to Balboa; and Panagra's, from Balboa down the west coast of South America to Santiago and thence eastward to Buenos Aires.

This interchange differed markedly from others the Board had considered in that the interchange connected a domestic route with an international route, providing for equipment interchange at an international gateway. In its opinion, the CAB acknowledged that the red tape of government clearance encountered at the gateway would reduce the advantages of through service by equipment interchange found to exist in domestic travel. However, despite the fact that passengers would still have to disembark and go through health, immigration, and custom checks, the Board believed that there was ". . . still a definite benefit to the traveling public in removing the possibilities of missed connections flowing out of connecting service and assuring passage to an ultimate destination . . .", and also noted that there was a strong public desire for through service at the Miami gateway.[100]

In May, 1951 the Board decided to amend its original order and

[97] *National Route Investigation*, Docket No. 3500 *et al.*, Order Serial No. E-5205, March 16, 1951.

[98] *Ibid.*, mimeographed opinion, pp. 12-13. The Board specifically stated in a later order that an extension of Eastern's route from Miami to Havana or Braniff's Latin American route to include Miami would be limited to interchange flights only, if granted. CAB Order Serial No. E-5642, August 23, 1951.

[99] CAB Order Serial No. E-5282, April 12, 1951. The supplement extended the Through Flight Agreement to 1961, and gave Panagra the right to operate the Panagra aircraft coming into Miami under that agreement over National's route to New York pursuant to the National-Panagra arrangement.

[100] *Ibid.*, mimeographed opinion, p. 6.

expand the *New York-Balboa Through Service Proceeding* to include consideration of a Braniff-National interchange at Havana and the possible participation of Panagra in the proposed Pan American-Eastern interchange operation.[101] Meanwhile, Pan American changed its attitude toward the National-Panagra interchange and exercised an option granted it in the recently approved supplement to the Through Flight Agreement to call upon Panagra to terminate the Panagra-National interchange. This action left the three airlines at loggerheads. Finally, the Board stated that lack of cooperation between the airlines made the interim interchange no longer feasible as a voluntary arrangement, and that since the agreements had been presented as voluntary arrangements and had been so considered all the way through the proceeding, the Board believed that it could not simply order the agreements to be activated. Consequently, the Board rescinded its temporary approval of the National-Panagra Interchange agreement and the Pan American-Panagra agreement.[102] However, the interchange remained one of the several under consideration in the proceeding.

Since international air routes are involved in the *New York-Balboa Through Service Proceeding,* any decision reached by the CAB must be approved by the President before it can become an enforceable order. In June 1951, the Board found that Braniff should interchange with Eastern and National with Pan American and Panagra at Miami. This decision was never acted on by former President Truman, but was returned to the CAB in January 1953 so that it could be resubmitted to the new Administration. It was subsequently sent to President Eisenhower, but in May 1953 he returned it to the Board, indicating that further evidence was desired because a considerable period of time had elapsed since the close of the hearings.[103] The complicated and drawn-out case is still on the CAB docket; however, unofficial reports indicate that a Board decision will soon go to the White House for approval once again.

Pan American-C & S Interchange at Houston. Another interchange proposal involving both foreign and domestic air service received the CAB's consideration in 1952, but not its approval. In February 1951, Chicago and Southern Airlines and Pan American had signed an agreement to provide one-plane through service between Chicago and Mexico City via St. Louis and the interchange point Houston. One year later, in May 1952, the Board disapproved the agreement, finding it not to be in the public interest. The Board maintained that there was insufficient traffic to support the proposed service and that there was

[101] CAB Order Serial No. E-5389, May 18, 1951. Miami was also included later as a possible interchange point for the Braniff-National arrangement. CAB Order Serial No. E-5642, August 23, 1951.

[102] CAB Order Serial No. E-5541, July 13, 1951, mimeographed opinion, pp. 10-11.

[103] "New York-Balboa Reopened Again," *American Aviation,* June 8, 1953, p. 65. "White House Wants Balboa Hearing," *American Aviation,* August 31, 1953, p. 56.

doubt as to the economic self-sufficiency of the operation. Furthermore, it found the interchange agreement to be contrary to its decision in the *Latin American* case[104] because it would create a third competitor for American Airlines and Braniff Airways, who already had been certificated to serve Mexico City from the Midwest. Finally, the Board feared that the interchange agreement would jeopardize route negotiations with the Mexican Government.[105]

Continental-Mid Continent Interchange. Although the development of foreign interchange service among U. S. airlines received little impetus in 1952, activity on the domestic scene was greater. In addition to the inauguration of interchange service between Kansas City and Miami via St. Louis by Mid-Continent and Eastern in January (see *Through Service Proceeding, supra*), Continental Air Lines and Mid-Continent Airlines began operating a Denver-Kansas City-St. Louis interchange service in February.

Continental and Mid-Continent had signed their agreement to provide through one-plane service between Denver and St. Louis via Colorado Springs and the interchange point, Kansas City, in April 1951, and had filed it with the Board for approval in the following month.[106] Finding that the benefits to the participants and to the publice of this relatively short interchange service — it is only 781 air miles from Denver to St. Louis via Kansas City, and 839 air miles when a stop at Colorado Springs is included — outweighed any harmful effects that might result to TWA (which servies both Kansas City and St. Louis) due to diversion of traffic, the Board approved the agreement on October 10, 1951.[107] Service was inaugurated in February 1952 with a once-daily round trip flight (Colorado Springs being served on westbound flights only).[108] The service remained unchanged in September 1952 when Braniff and Mid-Continent merged to become one carrier, Braniff.

Minnesota-California Through Service. Expansion of interchange service had reached a climax in 1951. Four new interchange operations were introduced in that year, adding almost a million seat-miles daily in interchange service. By the end of 1951, almost five per cent of the daily passenger airlift offered to the public by the domestic scheduled airlines was in interchange service. Furthermore, a long-awaited opinion in the *Southern Service to the West Case, supra,* had expressed the intent of the CAB to prefer interchange of equipment over route extension in future new through service cases. But in 1951, when all this occurred, the airlines were yet recovering from the lean years of the late forties. By the middle of 1952, however, the airline industry

[104] *Latin American Air Service,* 6 CAB 857 (1946).
[105] CAB Order Serial No. E-6452, May 23, 1952, mimeographed opinion, pp. 2-9.
[106] Report of J. Earl Cox, Examiner, Mid-Continent Airlines and Continental Air Lines, CAB Docket No. 4926, August 17, 1951, mimeographed copy p. 2.
[107] *Mid-Continent Airlines, Inc., and Continental Air Lines, Inc.,* Docket No. 4926, CAB Order Serial No. E-5778, October 10, 1951.
[108] *Official Airline Guide,* February 1952, p. 218.

was profitably carrying record volumes of traffic, and the old optimism was returning. With the return of prosperity, came the return of route expansion.

In August 1951, as an outgrowth of the *Salt Lake City-Rapid City Extension* proceeding in which Western Air Lines sought to have its route extended from Salt Lake City, Utah, to Rapid City, South Dakota, and thereby have a through route from Minneapolis to Los Angeles, the CAB instituted an investigation with respect to possible interchange services between the Twin Cities and Los Angeles, *viz.*, (1) United Air Lines between Los Angeles and Denver, and Western between Denver and the Twin Cities, (2) United between Los Angeles and Omaha, and Mid-Continent Airlines between Omaha and the Twin Cities, and (3) TWA between Los Angeles and Kansas City and Mid-Continent between Kansas City and the Twin Cities.[109] When it handed down its decision a year later, the Board gave the route extension to Western and dismissed the interchange investigation. It deemed a Kansas City interchange to be too circuitous – 231 miles longer than a connection at Denver, and 161 miles longer than Western's proposed service via Salt Lake City. Interchange between United and Mid-Continent at Omaha was held to be undesirable because Mid-Continent could not be expected to short-haul itself by delivering traffic at Omaha to United instead of carrying it to Kansas City for transfer to TWA. Finally, the Board dismissed the interchange between United and Western at Denver because the two carriers had indicated an unwillingness to enter into such an interchange, and would do so only under direct compulsion by the Board. The Board stated that, "Where attractive alternatives are available which offer additional benefits to the public, as in this case, we are not disposed to require an interchange arrangement between two such unwilling partners."[110] It is interesting to note that these two "unwilling partners" had cooperated to operate the first interchange service.

New York-Houston Interchange. Although the Mid-Continent interchanges with Eastern and Continental were the only interchange services inaugurated in 1952, the Board did approve a TWA and Chicago & Southern agreement in December which provided for the interchange of equipment at Indianapolis and/or St. Louis on flights between New York and Houston. The Examiner in the case had found the proposed interchange service to be in the public interest, but further recommended that final approval be deferred pending the Board's decision on a proposed merger between Delta Airlines and Chicago & Southern. Nevertheless, the CAB did not believe that the benefits which the interchange would provide for the public should be delayed, and on December 16, 1952 approved the agreement.[111] The

[109] CAB Order Serial No. E-5611, August 13, 1951.

[110] *Salt Lake City-Rapid City Extension*, Docket No. 4542, *et al.*, CAB Order Serial No. E-6831, September 25, 1952, mimeographed opinion pp. 4-5.

[111] *New York-Houston Interchange Case*, Docket No. 4656, CAB Order Serial No. E-7030, December 16, 1952.

proposed Delta-Chicago & Southern merger was subsequently approved several weeks later. This event in no wise basically changed the plans for the interchange operation, but did delay inauguration of the service.[112]

TWA and Delta-C & S (the resulting airline of the merger) finally began their interchange service on April 1, 1953 offering twice-daily round-trip schedules between New York and Houston (one schedule via Pittsburgh and St. Louis and the other via Pittsburgh, Indianapolis, Memphis, and Shreveport).[113]

United Interchanges at Denver with Braniff and Continental. Two more interchange services were inaugurated in the Fall of 1953, bringing the total number of domestic interchange operations to eleven. On October 30, 1952 United Air Lines entered into an interchange agreement with Braniff to provide one-plane through service between Seattle and Portland, on United's route west of Denver, and Oklahoma City, Dallas, Ft. Worth, and Houston, on Braniff's route east of Denver. At the same time, it also entered into an agreement with Continental Air Lines to provide similar through service between Seattle and Portland, and Wichita and Tulsa on Continental's route east of Denver. These proposed interchanges met with little opposition, and the agreements were approved by the CAB the following July.[114] Daily round-trip interchange service was inaugurated over both routes in September 1953.[115]

Although these interchange services offered one-plane through service between the Pacific Northwest and major cities in Kansas, Oklahoma, and Texas for the first time, the amount of new traffic they generated was disappointing to the participating carriers. Consequently, in April 1954 they filed to suspend operations over the two interchange routes, maintaining that they could better utilize the interchange aircraft over their own respective routes for the forthcoming seasonal traffic peak. The CAB approved the suspensions for the period from April 25 to December 31, 1954.

As previously indicated, the inauguration of interchange service over these two routes brought the total number of domestic interchange arrangements in operation at the end of 1953 to eleven. All but two of these eleven services had been started within the first three years of the '50s, a period during which the CAB had firmly kept the lid clamped on major route grants to the airlines, while looking favorably upon interchange of equipment and mergers.

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[112] *Delta-Chicago and Southern Merger Case*, Docket No. 5546, CAB Order Serial No. E-7052 and E-7053, December 24, 1952.

[113] *Official Airline Guide*, April 1953, p. 168.

[114] *Braniff Airways, Inc.-United Air Lines, Inc., Interchange of Equipment*, Docket No. 5827, CAB Order Serial No. E-7555, July 13, 1953, mimeographed opinion p. 1. *Continental Airlines, Inc.-United Air Lines, Inc., Interchange of Equipment*, Docket No. 5828, CAB Order Serial No. E-7556, July 13, 1953, mimeographed opinion, p. 1.

[115] *Official Airline Guide*, October 1953, p. 432.

Present Status and Outlook

The growth of interchange service in recent years has been noteworthy. Nevertheless, its place in the development of the air transportation system of the United States is not yet firmly established. Recently activated major route proceedings threaten to relegate interchange to a minor role in the development of the air transport pattern once again. It is too early to predict what the outcome of these route cases will be; however, it may be safely said that if the Civil Aeronautics Board grants major route awards in these cases, the interest in interchange operations exhibited by the scheduled airlines in the past several years will wane appreciably.

As 1948 drew to a close, the TWA-Delta through service between Detroit and Miami via the interchange point, Cincinnati, was the sole domestic interchange service in operation. As shown in Table 2 the two carriers were operating interchange service over about 1,700 route-miles daily, only 2.5 per cent of the total daily route-miles operated by all U. S. scheduled airlines in domestic service. At the end of 1953, nine out of the thirteen domestic trunklines were operating a combined total of eleven interchanges over almost 25,000 route-miles daily. The latter figure represented nearly a third of the domestic airline industry's daily total route-miles and reflected a fourteen-fold increase over 1948.

TABLE 2

DAILY ROUTE-MILES OPERATED IN DOMESTIC INTERCHANGE SERVICE, 1948-1953

End of Year	*Interchange Route-miles Operated*[1]	*Total Route-miles Operated*[2]	*Per Cent Interchange of Total*
1948	1,716	68,111	2.5%
1949	5,668	71,879	7.9
1950	5,668	76,686	7.4
1951	14,188	76,383	18.6
1952	16,210	77,617	20.9
1953	24,837	76,761	32.4

[1] Based on schedules published in *Official Airline Guide* and route mileages found in the *CAB Official Route and Mileage Manual.*

[2] Average unduplicated route-miles operated by trunk and local service airlines in last quarter of each year. Air Transport Assoc. of America, *Air Transport Facts and Figures*, 15th ed., 1954, p. 9.

The growth of interchange is further evidenced by the increase in the number of cities receiving interchange service. Only 18 cities were served by the Delta-TWA interchange route in 1948. By the end of 1953, the number of cities receiving interchange service had almost tripled, reaching a total of 51 — Table 3.

Despite the growth reflected in the above tables, it should be recognized that the amount of airlift actually being provided in interchange service today is quite small when compared to the total airlift offered to the public in domestic scheduled service. As shown in Table 4, although the average daily scheduled seat-miles in interchange service at the end of 1953 was nearly fourteen-fold that in 1948, inter-

TABLE 3
CITIES SERVED BY DOMESTIC INTERCHANGE SERVICES, 1948-1953

End of Year	*No. of Cities Served by Interchange*[1]	*Total No. of Cities Served*[2]	*Per Cent Interchange of Total*
1948	18	521	3.5%
1949	29	525	5.5
1950	28	580	4.8
1951	36	580	6.2
1952	41	584	7.0
1953	51	580	8.8

[1] Based on schedules published in December issues of *Official Airline Guide.*
[2] Air Transport Assoc. of America, *Air Transport Facts and Figures,* 15th ed., 1954, p. 9.

change service still accounted for only about five per cent of the average daily total capacity provided by all domestic scheduled airlines.

TABLE 4
DAILY SCHEDULED SEAT-MILES FLOWN IN DOMESTIC INTERCHANGE SERVICE, 1948-1953

Year	*Ave. Daily Sched. Interchange Seat-miles in Dec.*[1] (000)	*Ave. Daily Sched. Seat-miles in All Service for Year*[2] (000)	*Per Cent Interchange of Total*
1948	236	28,230	0.8%
1949	993	31,769	3.1
1950	1,090	35,575	3.1
1951	2,048	42,320	4.8
1952	2,340	51,981	4.5
1953	3,091	63,089	4.9

[1] Based on schedules in December issues of *Official Airline Guide,* airline distances in the *CAB Official Airline Route and Mileage Manual,* and aircraft seating capacity information received from the interchange carriers.
[2] Computed from annual total available seat-miles flown by domestic trunk and local service airlines as shown in: Air Transport Assoc. of America, *Air Transport Facts and Figures,* 15th ed., 1954, p. 12.

The Civil Aeronautics Board's restrictive attitude toward route expansion in recent years has fostered the growth of interchange service. But toward the end of 1953, there were signs that the pendulum was beginning to swing back — back to the early post-war years state when major route cases dominated the Board's docket of active proceedings. In November 1953, the Board opened hearings in the *New York-Chicago Case*[116] to consider new or additional service in the area between Chicago and New York (the area was further restricted primarily to cities south of Buffalo and north of Pittsburgh).[117] This case was the first of three gotten under way late in 1953. The other two are the *Denver Service Case,*[118] concerning additional service to Denver from both the East and the West, and the *Additional Southwest-Northeast Service Case,*[119] concerning new through service between "Oklahoma, Texas, and Louisiana cities" and "Northeastern cities" via

[116] CAB Docket No. 986, *et al.*
[117] "New York-Chicago Service Case Hearings Open," *American Aviation Daily,* November 2, 1953, p. 3.
[118] CAB Docket No. 1841, *et al.*
[119] CAB Docket No. 2355, *et al.*

certain "Midway cities.[120] Ten trunklines are seeking new routes in the *New York-Chicago Case* proceeding; seven, in the *Denver Service Case;* and eight, in the *Additional Southwest-Northeast Service Case.* The size and importance of these route proceedings is readily apparent. Several proposed interchange operations are also involved in these proceedings; however, their role appears to be secondary in nature. It is too early to predict what the outcome of these major route proceedings will be. Nevertheless, it may be safely said that, if the Civil Aeronautics Board grants major route awards to the exclusion of interchange service, the interest in interchange that the airlines have exhibited in recent years will all but disappear.

Economics Aspects of Interchange Service

Through Service and the Public Interest

The term "through service" may be used to describe several types of cooperative arrangements between two or more carriers. All of these arrangements have a common purpose, namely, to facilitate the movement in commerce of persons and property in order to bring to the public increased benefits in the form of faster transportation, greater convenience, and lower costs. Such arrangements may be limited to provisions for through ticketing of passengers, through handling of baggage, or through billing of freight; however, the most desirable form of through service from the standpoint of the traveling and shipping public is that which not only includes all of the above provisions but goes farther and actually permits the through movement of passengers, baggage, mail and freight from origin to destination without interruption at any intermediate point along the route of movement.[121] It is this broad meaning that the term "through service" usually is given and will be given in the following discussion.

Public interest in through service. Through service offers a number of benefits to the public. It removes the inconvenience to the passenger of moving from one airplane to another en route and of missing connections. It also results in a faster trip for the passenger since he loses no time at intermediate points along his route waiting for a connecting flight. Furthermore, through service eliminates the labor and time involved in transferring baggage, freight, and mail from one airplane to another en route. This means faster and cheaper service to passenger and shipper alike. It is because of these benefits that through service is recognized to be in the public interest.

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[120] The Oklahoma, Texas, and Louisiana cities included: Tulsa, Oklahoma City, Fort Worth, Dallas, Houston, San Antonio, and New Orleans; the Midway cities: Memphis, Nashville, Knoxville, Atlanta, Chattanooga, and Birmingham; and the Northeast cities: New York, Newark, Philadelphia, Baltimore, Washington and Pittsburgh.

[121] H. C. Westwood, and E. W. Jennes, "Compulsory Interchange of Aircraft Between Connecting Air Carriers," 34, *Virginia Law Review*, Part 1, January 1948, pp. 2-3.

In the Civil Aeronautics Act of 1938, Congress cited the desirability of through service from the standpoint of the public interest and gave the Civil Aeronautics Board the power to require it. Section 404 (a) imposes upon every air carrier the duty ". . . to provide reasonable through service . . . in connection with other air carriers" and Section 1002 (1) requires that the CAB shall ". . . whenever required by the public convenience and necessity . . . establish through service . . ."[122] The Civil Aeronautics Board has continually recognized the public benefits inherent in through service and has even gone so far as to point out that, "The ideal air transportation system, as far as the traveling public is concerned, would provide single-plane service between any two points in the country."[123] It appears to be well established that through service is "in the public interest."

Public interest in a financially sound airline industry. A financially healthy airline industry is also in the public interest. In 1938 Congress declared its intent to promote air transportation, indicating in the Civil Aeronautics Act that "the encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense" were in the public interest.[124] This policy has been implemented down to the present day by means of the application of public funds to the development of the air transportation system. It has been accomplished primarily through air mail payments to the airlines based on need rather than cost of service,[125] the provision of airways and navigational facilities, and the use of federal funds for airport construction. The cost has amounted to millions of dollars per year. Airline subsidy payments alone cost the Government $27,476,000 in the fiscal year ending June 30, 1953, according to the Civil Aeronautics Board.[126] In regard to airways and navigational facilities, the Civil Aeronautics Administration allocated cost responsibility in the amount of over $38,416,000 to the scheduled airlines for the use of the federal airways in 1953.[127]

Such use of public funds to foster the development of air transportation is not peculiar to the United States. Most governments have been quick to recognize the need to encourage the development of air transportation. In fact, it has been pointed out that there has been

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[122] *Civil Aeronautics Act of* 1938, 52 Stat. 973, as amended.

[123] *Transcontinental & Western Air, Inc.-Delta Air Lines, Inc., Interchange of Equipment*, 8 CAB 857,869 (1947). Also see *Chicago and Southern Air Lines, Inc.-Pan American World Airways, Inc., Interchange Agreement*, Docket No. 4863, CAB Serial Order No. E-6452, May 23, 1953, mimeographed opinion, pp. 11-12.

[124] *Civil Aeronautics Act of* 1938, *op. cit.* Sec. 2.

[125] Since October 1953 air mail payments to the domestic scheduled airlines from the Department of the Post Office have been based on service rates purportedly free of subsidy, while those airlines requiring financial aid have been receiving direct subsidy payments from the Civil Aeronautics Board.

[126] Civil Aeronautics Board, *Administrative Separation of Subsidy from Total Mail Payments of United States Air Carriers* (Wash.: G.P.O., 1953), p. 1.

[127] Civil Aeronautics Administration, *A Program of Charges for the Use of the Federal Airways System* (Wash.: G.P.O., 1953), p. 78.

some form of government subsidization in every air transport operating country.[128]

It is not within the scope of this paper to attempt to judge whether or not the promotional policy, as established by Congress in the Civil Aeronautics Act of 1938, is desirable; whether or not the promotional policy has been properly implemented; or whether or not the cost of fostering air transportation has been commensurate with the social benefits derived therefrom. Suffice it here to indicate and emphasize that a financially healthy airline industry is in the public interest not only because of the improved service it may bring to the traveling public, but also because the public, through its representatives in the federal legislature, has obligated itself to pay the industry's bills when it is financially ill.

Airline self-sufficiency. The airlines have made great strides toward self-sufficiency in recent years. The Civil Aeronautics Board recently pointed out in an annual report that ten out of the thirteen domestic trunkline carriers are entirely free from subsidy payments today. Furthermore, these ten account for 96 per cent of all traffic carried by domestic scheduled airlines within the continental United States. Nevertheless, although the large trunklines are apparently free of subsidy, the smaller trunklines and the local service airlines still rely heavily on subsidy for their financial strength. According to the CAB, subsidy payments to the small trunklines amounted to $4,200,000 in 1953, and about $22,000,000 in subsidy was paid to the local service carriers in the same year.[129] It should be noted of course that the actual amount of subsidy received by the airlines is open to question, depending upon the method of cost allocation used.[130]

In further regard to airline self-sufficiency, it also may be noted that the major trunklines' freedom from subsidy payments was only recently won and that their ability to maintain this status indefinitely is yet to be established. In 1947 and 1948 the entire airline industry was financially sick. Tremendous expansion of capacity after the war in order to meet an anticipated immediate demand for air travel of gigantic proportions became "over-expansion" when that demand failed to materialize. Normal growth in air travel brought demand more in line with supply in 1949 and the first half of 1950, and the impetus added by the effects of the defense build-up accompanying the Korean War soon filled hitherto empty seats. The major trunklines have enjoyed profitable operations in the '50s. Continued growth in the air travel market has meant increased revenues, year after year. Nevertheless, airline costs have been climbing upward also, and in 1953

[128] J. H. Frederick, *Commercial Air Transportation* (3d ed.; Chicago; R. D. Irwin, 1951), p. 286.

[129] *Annual Report of the Civil Aeronautics Board*, 1953 (Wash.: G.P.O., 1954), p. 2.

[130] For a trenchant analysis of methods for separating subsidy from air mail pay, see D. P. Locklin, "A Critique of Proposals to Separate Subsidy from Air Mail Pay," 18, *Journal Air Law & Com.* (Spring 1951), pp. 166-180.

shot up at a faster rate than revenues.[131] The narrowing profit margins experienced by these major air carriers forbodes financial difficulties despite record-breaking traffic volumes. Although presently free from subsidy payments, it is yet far from certain that the major trunklines will be able to retain their newly-won freedom.

As pointed out above, not all airlines receive subsidy payments today; however, all airlines do benefit from services provided by the government for which they are not required to pay. These services include such essentials as air traffic control, navigational aids, and weather service. It also has been mentioned that the cost responsibility allocated to the scheduled airlines by the Civil Aeronautics Administration for the use of the federal airways system in 1953 amounted to over $38,000,000. Profitable trunkline operations in recent years have incited considerable agitation for the imposition of user charges — charges to the airlines for their use of government facilities hitherto provided free. Should the airlines be forced to pay user charges, the major trunklines probably would have no great difficulty meeting immediate payments, although the additional burden might sharply reduce profits. That the major trunklines could make user charge payments without seriously threatening their financial positions — for the time being anyway — reflects the great strides toward self-sufficiency that have been made in recent years. But the small trunklines and the local service carriers still rely on subsidy. In their case, the payment of user charges would be in effect no more than a bookkeeping entry for the government accountants. Evidently, although the major trunklines may have reached a stage where they can be classed as "self-sufficient", the airline industry, as a whole, is not yet free of subsidy.

Need to revise domestic route pattern. Although there may be some disagreement as to where emphasis should be placed,[132] it appears that few students of transportation, if any, would disagree with the premise that reform in the domestic route pattern could do much to improve the airline industry's overall financial position. There also appears to be considerable accord in the opinion that the Civil Aeronautics Board route policy over the years has been less than effective in developing a sound route pattern.[133] A major criticism has been

[131] W. V. Henzey, "Revenues vs. Expenses Race Documented by CAB," *American Aviation*, March 29, 1954, pp. 22-23.

[132] After a thorough analysis of airline competition, Frederick W. Gill and Gilbert L. Bates of Harvard University came to the conclusion in 1949 that multiple-carrier competition was the principal obstacle to the attainment of a status of self-sufficiency. A couple of years later, Dr. Harold D. Koontz of the University of California at Los Angeles effectively presented the argument that, although route inadequacy was the basic factor affecting airline profitability, the underlying problem was not particularly one of multiple-carrier competition, but rather the size and character of the market facing each carrier. See F. W. Gill and G. L. Bates, *Airline Competition* (Boston: Harvard School Bus. Adm., 1949); H. D. Koontz, "Economic and Managerial Factors Underlying Subsidy Needs of Domestic Trunk Line Air Carriers," 18 *Journal Air Law & Com.* (Spring 1951), pp. 127-156; and comment on Mr. Koontz's articles by John P. Carter of the University of California: "Domestic Air Line Self-Sufficiency: Comment," 48 *Am. Economic Rev.* (June 1953), pp. 368-373.

[133] See for example: *Survival in the Air Age*, A report by the President's Air

that the Board has not taken the initiative in planning the airline route pattern, but has simply decided route cases as they have been brought before it by the air carriers. Nevertheless, recent actions by the CAB indicate that it recognizes the importance of route structure to a financially sound airline industry and is making a concerted effort to improve it. The Board has encouraged and approved several significant mergers in the past several years in its efforts to improve route systems and create financially stronger airlines that will have a better chance of being self-sufficient than either of their component parts.[134] But, although commendable, such efforts to reconstruct the airline route pattern are limited in effect and slow to bear fruit. Meanwhile, the U. S. public, traveling and shipping more and more each year, continues incessantly to demand more new through service.

How can the utility of this new through service be maximized? More specifically, how can this new through service be provided at least cost to the airline industry — and, therefore, at least cost to the public? In answer to this question it can be pointed out that three ways of providing new through service exist, *viz.*, (1) interchanging equipment over existing routes, (2) expanding the present route structure, and (3) consolidating existing routes by means of airline consolidations. More questions naturally follow. Which of these methods offers the greatest net benefit to the public? Should one be used to the exclusion of the others, or is there a proper place for each in the evolution of the air transport route pattern? The balance of this chapter suggests answers to these fundamental questions.

Interchange Service and Route Expansion

Where a city is not presently being served by a scheduled airline, any new through service it might receive would necessarily have to be provided by the expansion of the existing airline route pattern. Furthermore, where two or more cities having a community of interest are currently connected by air routes, but the service is circuitous and slow, the need for new through air service may best be met by the certification of a more direct route between these cities. However, where cities having a community of interest already receive reasonably direct connecting service over the routes of two or more scheduled airlines, interchange of equipment enters into consideration as a desirable method of providing new through service and offers several distinct and important advantages that make it preferential to route expansion, *viz.*, (1) it requires no new ground facilities, (2) it does little to disturb the existing route structure, and (3) it introduces flexibility into the route system.

When provided by new routes or the extension of existing routes,

Policy Commission (Wash.: G.P.O., 1948), p. 110; and, C. L. Dearing and W. Owen, *National Transportation Policy* (Wash.: Brookings Inst., 1949), pp. 199-200.

[134] *Braniff/Mid-Continent Merger Case*, Docket No. 5376, CAB Order No. E-6459, May 26, 1952; and, *Delta-Chicago and Southern Merger Case*, No. 5546, CAB Order Serial Nos. E-7052 and E-7053, December 24, 1952.

new through service necessitates additional requirements for aircraft, flight crews and ground facilities. Furthermore — and the extent to which this is applicable depends on the nature of the route extension — such new ground facilities as are required must be adequately staffed with personnel. Each new station added will have its share of the following expenses: ground operations, ground and indirect maintenance, passenger service, traffic and sales, advertising and publicity, general and administrative, and ground depreciation. In contrast with this, interchange service makes use of existing equipment, facilities, and personnel and entails little additional cost. It transforms two or more connecting flights into one through flight, and in order to do so, requires little more than a greater amount of cooperation and coordination between the air carriers involved than was demanded by the prior connecting service.[135]

As pointed out above, new through service is in the public interest, but a financially healthy and self-supporting airline industry, operating over an economically sound route structure, is also in the best interest of the public. A new route or the extension of an existing route to provide new through service between two points already receiving two-plane (or more) connecting service necessarily diverts traffic from the existing service, if it reduces en route travel time and removes the inconvenience of changing airplanes and perhaps missing a connecting flight. This resulting diversion can have a deleterious effect on the financial health of one or more of the carriers providing the connecting service. Furthermore, it may abruptly disturb a delicate balance in the existing route structure.

Interchange of equipment, on the other hand, is an arrangement between existing carriers that improves existing service with a minimum of disturbance. Although it may divert traffic from the carriers serving the points in question via other intermediate points, as would a new route or route extension, it does little to disturb historical participation in the traffic over the route it serves. Furthermore, if experience later does reflect an undesirable amount of diversion from other carriers serving the two points, the Civil Aeronautics Board may peremptorily terminate the interchange agreement and easily remove the disturbance.

Experience has shown that once awarded, an airline route tends to become a permanent thing. This permanence introduces a rigidity

[135] The American-Delta-National interchange can be used to exemplify the magnitude of the savings that may result from an interchange arrangement as opposed to route extension. Suppose that National Airlines' route system were extended from New Orleans, its present western terminus, to Dallas and then on to the West Coast to serve San Diego, Los Angeles, San Francisco, and Oakland. Such a route extension would permit National to provide the same through service which the American-Delta-National interchange currently offers. Based on National Airlines' average station expense per flight at its major stations (Jacksonville, Miami, New Orleans, New York/Newark, Norfolk, Tampa, and Washington) in the first quarter of 1954, and the number of flights operating in the current interchange service, the author estimates that the additional cost to National to provide the southern transcontinental through service alone would be in the neighborhood of $10,000,000 annually.

into the national route pattern that makes adjustment to change difficult and keeps a sound route structure only a distant goal. Interchange of equipment, on the other hand, introduces an element of flexibility into the route system. The irrevocable nature of a permanent certificate of public convenience and necessity is absent. If experience should prove an interchange service to be an undesirable operation, the participating airlines or the Civil Aeronautics Board need only terminate the interchange agreement. No additional facilities were required to inaugurate the service; consequently, no substantial investment need be written off as a loss, if the interchange service is terminated. Recent examples of this flexibility in interchange service are the cases of the United Air Lines-Continental Air Lines interchange operation, providing through service between the Pacific Northwest and Kansas and Oklahoma via the interchange point, Denver, and the United Air Lines-Braniff Airways interchange, providing through service between the Pacific Northwest and Oklahoma City and Dallas via the interchange point, Denver. Maintaining that they needed their aircraft over their own routes for the forthcoming seasonal traffic peak, United, Continental and Braniff applied to the CAB for temporary suspension of their interchange services in April 1954. The Board acceded to their request and approved the temporary suspension of the United-Continental interchange from April 25 through August 21, 1954, and the United-Braniff interchange from April 25 through December 31, 1955.

Consolidation

In addition to route extension and interchange of equipment, a third method of providing new through service for the traveling and shipping public is consolidation of airlines. Depending upon the circumstances, consolidation can offer a number of significant benefits which may make it the preferable method to use in a given instance.

The consolidation of airlines currently linked by connecting routes may create a single superior route system where two relatively weaker ones previously existed, and in so doing may even be responsible for replacing subsidy with self-sufficiency. Such financial betterment can come from both new revenue traffic and decreased unit costs. The replacement of two-plane connecting service over the routes of two carriers with new one-plane through service over the routes of a single carrier can normally be expected to generate new traffic and additional revenue. Probably even more significant than this probable effect on revenues, however, is the potential impact consolidation may have on costs. Consolidation of airlines may offer an opportunity for increased efficiency and savings. This is especially pertinent where duplicate facilities and services exist prior to consolidation. The merger of two airlines can mean greater utilization of aircraft, facilities, and personnel. Considerable savings in ground and indirect expenses may result.[136] Even where the amount of duplication which can be eliminated

[136] Examples of such savings may be found in the following Civil Aeronautics

is negligible, consolidation can offer cost savings normally associated with size. Not unlike other areas of economic activity, economies of scale are also present in the airline industry. For example, big airlines with sizable assets and earning power are usually better able to command adequate low-cost financing for equipment purchases or the expansion of capital facilities.

Despite the benefits it may offer, however, consolidation has a number of limitations which rather sharply restrict its use as a method for providing new through service. Probably of primary importance in this respect is the fact that, generally speaking, new through service is primarily a by-product of consolidation. Potential improvement in the financial condition of one or both of the carriers is usually the basic motivation for consolidation. Because of this fact, consolidation cannot be expected to introduce new through service where the greatest demand for it exists.

Another limitation to the use of consolidation as a method of providing new through service is its cost. Consolidation can be a very expensive action.[137] Furthermore, if anticipated benefits are not forthcoming, a consolidation can be a mistake that is very difficult to correct. The financial success of a consolidation is never assured. A current example of this is the Braniff/Mid-Continent merger which took place in August 1952. Prior to the merger, Braniff was on a CAB "service" or non-subsidy mail rate, while Mid-Continent was on a "subsidy" rate. When the merger was effected, the Civil Aeronautics Board was of the opinion that Braniff, the surviving company, could operate the entire system at its non-subsidy rate. Evidently the anticipated economies of the combined operation were not forthcoming. Within a year and a half after the merger, Braniff had to petition the Board for subsidy relief.[138]

Still another limitation to the use of consolidation is the difficulty of effecting it. Many months of preparation and great effort are required to successfully merge two corporate structures and their respective operations. It is not a simple matter to satisfy the Civil Aeronautics Board, stockholders, creditors, management, and employees all at the same time. Union labor contract provisions can be an especially formidable obstacle.[139]

Board examiner reports: Report of William J. Madden, Examiner, *Braniff/Mid-Continent Merger Case*, CAB Docket No. 5376, April 10, 1952; and Recommended Decision of William F. Cusick, Examiner, *Delta-Chicago and Southern Merger Case* CAB Docket No. 5546, November 13, 1952.

[137] Delta Airlines and Chicago and Southern Airlines merged in May 1953. While business boomed for the merged company during fiscal 1954, the first year of combined operations, profit (net after taxes) dropped by almost $3,000,000. Partly responsible for this, according to President C. E. Woolman, were the expense of standardizing equipment, facilities, and training plus the legal and administrative work involved. "Delta-C&S Net Profit Drops in Merger Year," *Aviation Week*, August 2, 1954, p. 68.

[138] "Braniff Asks Return to Subsidy Status," *American Aviation*, January 18, 1954, p. 65.

[139] A striking example of how union labor contract provisions may wreck otherwise acceptable consolidation plans may be seen in the case of the recently

The use of consolidation to provide new through service is further limited by its voluntary nature. The Civil Aeronautics Board may be capable of encouraging consolidations by exerting pressure on airlines through its power to determine mail rates.[140] However, it lacks direct control. Even when it considers a consolidation to be in the public interest, the Board lacks the power to compel it if the carriers hold permanent certificates of public convenience and necessity for their routes, as do the trunklines.[141] The CAB possesses greater power over the local service airlines since they hold only temporary certificates at the present time. Nevertheless, by their very nature these "feeder" airlines were created and exist primarily to feed traffic from outlying small cities to trunkline routes, not to combine and assume the characteristics of trunklines.

An economy-minded Administration is encouraging mergers as a method for reducing subsidy.[142] No doubt this encouragement will add strength to the Civil Aeronautics Board's persuasive powers and stimulate more consolidation activity. Desirable as such consolidations may be, it is difficult to see how much of the demand for new through service can be satisfied by consolidation alone.

Since consolidation cannot be expected to do the job alone, interchange of equipment and route extensions must be relied upon to fill the gap in providing new through service. As stressed earlier, the advantages of interchange service, *viz.*, no new ground facilities required, minimum disturbance of existing route structure, and needed flexibility built into the route system, recommend its greater use. The airline industry has been and continues to be one of dynamic growth. Many of the industry's most difficult problems in the future will probably be the result of conflict between original route pattern and technological progress in aviation. A route system with built-in flexibility will be better able to meet the demands of progress than one with a rigid route pattern.

Federal Regulation of Interchange Service

Interchange Agreements Under the Civil Aeronautics Act

The Civil Aeronautics Board's authority to regulate interchange agreements under those provisions of the Civil Aeronautics Act which govern the filing and approval of agreements and leases was clearly established in early interchange cases. It has never been seriously challenged. The airline industry's initial interchange agreement be-

dropped merger of two all-cargo carriers, The Flying Tiger Line and Slick Airways. Although approved by the Civil Aeronautics Board, the apparently imminent merger was never consummated because of labor protection conditions which the companies estimated would have cost the surviving airline several million dollars. "Flying Tigers-Slick Give Up on Merger Idea," *American Aviation*, September 27, 1954, p. 4.

[140] C. L. Dearing and W. Owen, *National Transportation Policy* (Washington: Brookings Institution, 1949), p. 266.

[141] Op. cit. 128, pp. 149-150.

[142] "Industry Hostile to ACC Recommendations," *American Aviation*, June 7, 1934, p. 31f.

tween United Air Lines and Western Air Express was approved in 1940 under sections 408 and 412 of the Act.[143] The provisions of these two sections have governed the submission and approval of interchange agreements ever since. Arguments favoring the applicability of other sections of the Act have been advanced by individual airlines on several occasions, but in each case the CAB has seen fit to dismiss them.

United and Western filed their interchange agreement in accordance with the requirement of section 412 (a) of the Act which directs that:

> Every air carrier shall file . . . [with the CAB] . . . a true copy . . . of every contract or agreement . . . affecting air transportation . . . between such air carrier and any other air carrier . . . for pooling . . . equipment . . . or for other cooperative working arrangements.

Furthermore, they sought approval of the agreement under paragraph (b) of section 412 which requires that:

> [The CAB] . . . shall by order approve any such contract or agreement . . . that it does not find to be adverse to the public interest, or in violation of this Act. . . .

The Civil Aeronautics Board acknowledged the applicability of these provisions in section 412, but ruled that section 408 also applied.

Section 408 (. . . *Acquisition of control*) —The applicability of section 408 of the Act derives from the provision in paragraph (a) which states that:

> It shall be unlawful unless approved by order . . . [of the CAB] . . . for any air carrier . . . to . . . lease or contract to operate the properties, or any substantial part thereof, of any air carrier. . . .

and the stipulations in paragraph (b) which direct that:

> Unless, after . . . [a public] . . . hearing, the . . . [CAB] . . . finds that the . . . lease, operating contract . . . will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order, approve such . . . lease, operating contract . . . upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe; *Provided*, that the . . . [CAB] . . . shall not approve any . . . lease, operating contract . . . which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the . . . lease, operating contract. . . .

The Board had maintained that sections 412 and 408 are supplementary and explains their relationship in this way:

> If there is a contract or lease involving something less than a substantial part of the properties of any carrier, it is enough if it meets the public interest test prescribed in section 412 (b), but if a substantial part of the properties of any carrier is subject to such contract or lease, a hearing must be held and the additional test of the first proviso in section 408 (b) . . . [see above] . . . must be met. In the latter case . . . the possibility of control is greater, which demon-

[143] *United A. L.-Western A. E., Interchange of Equipment*, 1 CAA 723 (1940).

> strates the need for a hearing and the additional safeguard embodied in the proviso.[144]

Being a relative term, the key word, "substantial," in section 408 has not been construed by the CAB to mean any particular amount or proportion of the total assets of an airline. In practice, amounts as low as two or three per cent of an airline's total assets have been held to be "substantial" within the meaning of section 408.[145] On the basis of the Board's record to date in interchange cases, it would be reasonably safe to assume that a single airplane would be considered by the Board to be a "substantial" part of any airline's total assets.

Insofar as the public interest is concerned, the Civil Aeronautics Board has interpreted the expressions "adverse to" in section 412 (b) and "not . . . consistent with" in section 408 (b) to have essentially the same meaning. Consequently, it has maintained that the same considerations should govern decisions with respect to the public interest under both sections.[146] As a general rule, the Board has considered the public interest to best be served when the statutory objectives of the Civil Aeronautics Act, as enumerated in section 2 ("Declaration of Policy"), are most fully satisfied. In most cases, the Board has attempted to determine the probable net effect of any proposed interchange service upon the public interest. This logical approach has required that the Board weigh such factors as the generation of new traffic, a more efficient performance by the participating carriers, the effects on other carriers, and the promotion of air transportation in general, as well as the benefit to the traveling public from new through service, in its deliberations in interchange cases. No single criterion has been held to be controlling. For example, when Delta Air Lines and TWA sought to add interchange service between Detroit and New Orleans to their existing Detroit-Miami operation in 1949, the Board disapproved their application because only Delta stood to gain from the additional operation. Neither Delta nor TWA contended that the interchange service was necessary to satisfy the demands of existing traffic. The principal benefit was to have come in the freedom Delta would have had in operating its equipment so as to permit more efficient rotation and greater utilization. Considering the net benefit to be derived rather than just the gain to one carrier, the Board stated that:

> In view of the slight benefits which would accrue to the traveling public and to Delta, and the diversional effect on Chicago and Southern . . . [Airlines] . . . , we find that the adverse effect . . . would outweigh the benefits to be derived. . . .[147]

The authority of the CAB to regulate interchange service under the

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[144] *United A. L.-Western A. E., Interchange of Equipment*, 1 CAA 727 (1940).

[145] See for example: *Transcontinental & Western Air, Inc.—Delta Air Lines, Inc. Interchange of Equipment*, 8 CAB 864 (1947); and, *Capital Airlines, Inc.—National Airlines, Inc., Interchange of Equipment*, 10 CAB 240 (1949).

[146] *United A. L.-Western A. E., Interchange of Equipment*, 1 CAA 728 (1940).

[147] *Transcontinental & Western Air, Inc.—Delta Air Lines, Inc., Interchange Agreement (Reopened Proceeding)*, 10 CAB 535 (1949).

provisions of the Civil Aeronautics Act probably received its greatest challenge in the TWA-Delta interchange case in 1947.[148] Eastern Air Lines, acting in the capacity of an intervener in this case contended that the Board had no jurisdiction to approve or disapprove the interchange agreement in question under either sections 408 or 412, since the parties were not legally bound by the agreement to undertake the operation. Nevertheless, the Board stated that it was unnecessary to decide whether or not the agreement before it was enforceable by either party in a court of law. The Board stated that:

> . . . an agreement is subject to the provisions of section 412, even where it is not legally enforceable; it is enough that the parties in fact are carrying out, or intend to carry out, the provisions of the agreement. Similarly, it appears clear that section 408 is concerned with any course of conduct which brings about the relationship covered therein whether that conduct is embodied in an enforceable agreement or not.[149]

Eastern challenged the CAB's jurisdiction again a couple of years later, but failed to carry its argument in the second instance, too.[150]

In addition to challenging the Board's overall jurisdiction in interchange cases, as pointed out above, airlines in several instances have taken the position that sections of the Civil Aeronautics Act other than 408 and 412 are also applicable. In such cases however, the Board has consistently ruled against the contesting airline.

An early example of this occured in the United-Western case. In that proceeding, TWA, acting in the capacity of an intervenor, maintained that section 411 was also applicable. This section of the Act deals with unfair or deceptive practices or methods of competition. Disagreeing with TWA's contention, the Civil Aeronautics Board stated that:

> No complaint has been filed under section 411, which provides for the issuance . . . [by the CAB] . . . of orders to cease and desist from practices or methods of competition which it finds after notice and hearing, to be unfair or deceptive, and an investigation thereunder has not been instituted . . . in this case. . . . The agreement is not yet in effect, and section 411 applies only to past or existing practices or methods of competition. Insofar as destructive competitive practices generally are concerned, the extent to which they may be embodied in the terms of the agreement is a matter to be considered in this proceeding in connection with the public interest.[151]

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[148] *Transcontinental & Western Air, Inc.—Delta Air Lines, Inc., Interchange of Equipment*, 8 CAB 871 (1947).

[149] *Ibid.*, p. 241. Also see: *Transcontinental & Western Air, Inc.—Delta Air Lines, Inc., Interchange of Equipment*, 8 CAB 859 (1947). The Board went into greater detail in the latter case in explaining the basis for its opinion and drew a comparison with the Sherman Act, saying: "We think therefore that the words 'contract or agreement' in section 412 are intended, like the word 'contract' in section 1 of the Sherman Act, to include all understandings which are, or may become, the basis of concerted action." p. 860.

[150] *Capital Air Lines, Inc.—National Airlines, Inc., Interchange of Equipment*, 10 CAB 231 (1949).

[151] *United A. L.-Western A. E., Interchange of Equipment*, 1 CAA 725 (1940).

Of greater significance than the question of the applicability of section 411 were several attempts to bring section 401 of the Act into interchange proceedings. Section 401 concerns certificates of public convenience and necessity. It specifically directs that no air carrier shall engage in public air transportation over a particular route unless there is in force a certificate issued by the Board after public notice and hearing which authorizes it to do so.

In the *Pan American-Panagra Agreement*[152] case in 1947, interveners argued that under the through flight agreement in question Panagra's aircraft would be operating between Balboa and the United States over a route which Panagra was not authorized to serve. Consequently, they maintained that Panagra should be required to obtain either an amendment to its certificate under section 401 or a specific exemption to the extent necessary to perform the through flight operation. The Board disagreed with this argument. It concluded that neither an amendment to Panagra's certificate of public convenience and necessity, nor a specific exemption, was required. Complete control and responsibility for the operation over Pan American's route between Balboa and the United States was to be assumed by Pan American under the agreement, and there would not be ". . . a holding out to the public of Panagra as the carrier certificated to operate north of the Canal."[153]

The question of the applicability of section 401 arose again later in the same year; however the basis of the argument presented was different. An intervener in the *Transcontinental & Western Air Inc. —Delta Air Lines, Inc., Interchange of Equipment*[154] case pointed out that the Interchange agreement under consideration permitted the delivery of airplanes used in the proposed interchange service at points other than Cincinnati, the interchange city. The contention was made that approval of the agreement:

> . . . would authorize the delivery of planes by one of the applicants at any point other than Cincinnati on the route of the other applicant, which would be tantamount to authorizing non-certificated scheduled operations by one of the parties.[155]

In response, the Board countered with the argument that the applicants did not contemplate interchanging airplanes at any point other than Cincinnati except in an emergency such as might be caused by bad weather. It further indicated that since the revenues from the interchange operation were to be shared on the basis of interchange at Cincinnati, it was unlikely, ". . . that either party would operate beyond that point and bear expenses incidental thereto except in an emergency."[156] The Board also pointed out, as it had done in the Pan American-Panagra proceeding, that the lessee had complete control and

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[152] 8 CAB 50 (1947).
[153] *Ibid.*, p. 54.
[154] 8 CAB 857 (1947).
[155] *Ibid.*, p. 871.
[156] *Ibid.*

responsibility for the operation over its own route. Its conclusion was that section 401 of the Act was in nowise being violated. In this interchange case, as in the others, the Board approved the interchange agreement under the provisions of sections 408 and 412.

Compulsory Interchange

In addition to having the power to approve or disapprove interchange agreements, it appears that the CAB also has adequate authority to compel air carriers to provide interchange service should it deem such service to be in the public interest. Nevertheless, the Board has never tested its power in this regard. Thus far, it has relied solely upon voluntary interchange arrangements for the development of interchange service. Although such voluntary arrangements tend to come slowly, there is considerable merit in the Board's policy. An interchange operation is assured greater success if the participating carriers are willing, as well as able, to provide it.

Experience indicates that voluntary interchanges come slowly. Only twelve such interchange arrangements have been inaugurated since World War II. There is a simple explanation for the apparent rereluctance on the part of the airlines to voluntarily enter into interchange agreements. Airline managements consider interchange to be only "second best." Route extension ranks as their first choice. The most obviously attractive interchange possibilities from the standpoint of airline management are those connecting routes of two or more carriers which link together relatively distant points, having a strong community of interest, via several good intermediate points, including a strong point of connection. It is also desirable that the interchange route should permit each of the participating carriers to provide a substantial part of the haul. Such a situation, however, not only makes a good case for interchange service, but also, ". . . is precisely the kind of situation which whets the appetite of a carrier for a route extension and furnishes the most elegant statistics of traffic for which such an extension would provide one-carrier service.[157]

That this explanation of airline management's general attitude toward interchange is borne out by experience may be seen by briefly examining the inauguration dates of the eleven interchange services in operation within the borders of the United States today. The first two began in 1948 and 1949, during a period when the ill effects of post-war over-expansion of routes and service were just beginning to result in corrective action by the Board. The remaining nine interchanges began within the years from 1951 through 1953, a period during which the Civil Aeronautics Board was discouraging further expansion of the domestic route structure.[158]

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[157] H. C. Westwood, and E. W. Jennes, "Compulsory Interchange of Aircraft between Connecting Air Carriers," 34 *Virginia Law Rev.*, Part 1, January 1948, pp. 22-23.

[158] See Table 5 for inauguration dates of interchange services.

Authorization for compulsory interchange. That the Board need not rely entirely on the volition and initiative of the airlines for the development of interchange services appears to be well-established. Section 1002 (i) of the Civil Aeronautics Act states:

> "The . . . [Civil Aeronautics Board] . . . shall, whenever required by the public convenience and necessity, after notice and hearing, upon complaint or upon its own initiative, establish through service . . . and the terms and conditions under which such through service shall be operated. . . ."

It has been pointed out that, for all practical purposes, section 1002 (i) is identical with the through route provisions of the Hepburn Act of 1906, which are embodied in section 15 (3) of the Interstate Commerce Act. The fact that specific language concerning interchange does not appear in the Civil Aeronautics Act has not been interpreted to mean that Congress intended that interchange should not be required. Based on the precedence of past interpretations of the Interstate Commerce Act and railroad experience, the argument has been effectively presented that many of the regulatory provisions of the Civil Aeronautics Act have been cast in general terms, the details of which have been left to be spelled out by administrative and judicial interpretation. That the compulsory through service provisions of the Civil Aeronautics Act vest in the Board the power completely to meet the public need makes sense both legally and logically.[159]

Precedents set by railroad litigation have also been cited as indicating that the Civil Aeronautics Board's power to compel interchange is not limited to cases where each of the participating carriers furnishes operating equipment, but that only one of the connecting carriers can be required to provide the aircraft to be operated by each.[160] Similarly, railroad precedents indicate that an airline not desiring the interchange service and not providing aircraft therefore, could be compelled to receive the aircraft of the connecting carrier and operate them through the connecting point and over its route. Furthermore, it is possible that it even could be compelled to provide aircraft though it might have to purchase them for the purpose.[161]

In addition to section 1002 (i) of the Act, section 404 (a)[162] has also been interpreted as giving the Board the power to require that interchange service be instituted or continued and to control the adequacy of such service to the same extent that it does the service provided by a carrier over its routes.[163] The Civil Aeronautics Board appears to have adequate authority to compel interchange of equipment to provide through service should it choose to do so.

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[159] Westwood and Jennes, *op. cit.*, p. 19.

[160] *Ibid.*, case cited: *U. S.* v. *Pennsylvania R. R.*, 323 US 612 (1945).

[161] *Ibid.*, case cited: *Louisville Board of Trade* v. *Indianapolis, Columbus & Southern Traction Co.*, 27 ICC 499, 504 (1913).

[162] "It shall be the duty of every air carrier . . . to provide reasonable through service . . . in connection with other carriers . . ." Sec. 404 (a).

[163] *Op. cit.*, 128, p. 175.

CAB use of authority to compel interchange. Although it has recognized and declared that it has authority under the Civil Aeronautics Act to compel the airlines to enter into interchange agreements, the Civil Aeronautics Board has never seen fit to put its authority to the test and attempt compulsion. Instead, when its deliberations have motivated it to decline route extensions and to recommend interchange of equipment as a substitute, it has made a practice of "keeping the record open" for 60 days after its decision, so as to permit the airlines to work out the arrangements voluntarily among themselves. This practice has proven to be very effective. The airlines have invariably reacted positively to the Board's firm but gentle pressure and have come up with suitable interchange agreements. The wisdom of the Board's policy in such cases is apparent. An interchange arrangement worked out in an amicable atmosphere with all parties willingly cooperating is certain to be more successful than an interchange arrangement forced upon reluctant carriers.

The Board's power to compel interchange gives it a powerful tool with which to effect a large measure of reform in the existing route system. Whether or not it can cancel an existing certificate of public convenience and necessity and install interchange service in its place in order to reduce wasteful route duplication may be open to serious legal question. This probably accounts for the Board's reluctance to attempt to compel interchange.[164] That it can use interchange of equipment to provide new through service, however, is beyond question. In this role alone, interchange provides the CAB with what probably is its most effective tool for fashioning an economically stronger route system. That the Board has not made greater use of this tool is regrettable.

The Interchange Agreement

With only few exceptions, interchange agreements approved by the Civil Aeronautics Board have contained basically similar general provisions. These provisions merit consideration here, because they reflect the nature and extent of the control the CAB exercises over interchange arrangements. They are summarized below under four headings, *viz.*, equipment and personnel; flight control; revenue and cost distribution; and modification, supplementation and termination of the agreement. The selection of these four categories was arbitrary. The provisions do not appear under these headings in interchange agreements. Nevertheless, it is felt that the following breakdown is a logical one and serves to facilitate presentation.

Equipment and personnel. Each party to an interchange agreement is responsible for the major inspection, maintenance, overhaul, and the replacement of major parts of its own aircraft. Furthermore, it is required to guarantee that its aircraft meet the standards and require-

[164] Selig Altschul, "CAB Asks Interchange Agreement," *Aviation Week*, December 4, 1950, p. 43.

ments of the Civil Air Regulations and are in satisfactory condition before delivery to another party to the interchange agreement. On the other hand, the carrier actually operating the aircraft, whether the owner or the lessee, is responsible for all necessary flight inspection and enroute and turnaround flight maintenance.[165] The lessee is also completely responsible for any damage to the interchange aircraft while in its possession except where the damage is due to the negligence of of the lessor.[166] Such essential items as type, number and ownership of aircraft to be used in the interchange operation either may appear in the initial interchange agreement or may be treated as details to be worked out in a supplemental agreement. Captains assigned by their respective carriers to operate the interchange flights are authorized to deliver and accept delivery of leased aircraft at the interchange point. Aircraft leased for the interchange operation may be used by the lessee only for purposes connected with that operation.[167]

In regard to personnel, each party to an interchange agreement is required to provide qualified flight crews, dispatchers, and all other necessary personnel for that part of the operation that it carries on, and is responsible for their training and qualification. Provisions may appear which call for the development of specific training programs to familiarize the lessee's personnel with equipment, maintenance, and procedures of the lessor.[168] If more than one party is to furnish aircraft, each lessor is required to familiarize each lessee's interchange personnel with the lessor's equipment, maintenance, and procedures. In the interest of safety, the Board has never seen fit to require that identical aircraft be used by all parties to an interchange agreement when more than one intends to furnish aircraft for the interchange operation; however, it has required that there be substantial standardization of equipment (instruments, power controls, etc.) in such cases, where the same type of aircraft is to be used by both interchange parners.[169]

In general, interchange flights utilize the crews of all parties to the interchange agreement, each party furnishing personnel to operate that portion of the flight over its own route. An interesting exception to this general practice is the Capital—National interchange operation. In this particular case, due to the complementary nature of seasonal traffic peaks over the routes of the two carriers — demand is greatest for Capital's service in the summer months, for National's in the winter — the interchange operation is performed with Capital's aircraft and crews from the middle of December through the middle of May and

[165] See for example: *Transcontinental & Western Air, Inc.—Delta Air Lines, Inc., Interchange of Equipment*, 8 CAB 869 (1947); or *Delta Air Lines, Inc.—American Air Lines, Inc., Interchange of Equipment*, 10 CAB 765 (1949).

[166] *Transcontinental & Western Air . . ., ibid.*, p. 871.

[167] *Delta Air Lines, Inc.—American Air Lines, Inc. . . ., op. cit.*, p. 764.

[168] See for example: *Transcontinental & Western Air, Inc.—Delta Air Lines, Inc. . . . op. cit.*, p. 869; or *Delta Air Lines, Inc.—American Air Lines, Inc. . . ., ibid.*

[169] *Pan American-Panagra Agreement*, 8 CAB 62 (1947); *Delta Air Lines, Inc.—American Air Lines, Inc., Interchange of Equipment*, 10 CAB 761 (1949).

with National's aircraft and crews during the other six months. This type of interchange arrangement raises additional safety questions concerning route familiarization for the crews of one party flying over the route of the other party. Nevertheless, in regard to the Capital-National arrangement, the Civil Aeronautics Board found no evidence that the operation would be unsafe since adequate plans had been established for flight-crew training which included among other things familiarization flights and acquaintance with airport data, weather characteristics, and navigational facilities on each carrier's route.[170]

The special benefit to airline employees from an interchange such as the Capital—National operation makes this type of arrangement especially desirable. Better utilization of the aircraft and crews of each carrier during the seasonal low in demand for its passenger service permits steadier year around employment and higher average monthly earnings.

Labor problems have caused the CAB little concern in most interchange cases. Where an interchange agreement has been in conflict with bargaining agreements between the interchange carriers and the labor organization representing their employees, the Board has conditioned its approval of the interchange agreement in question on the carrier's compliance with procedures set forth in the Railway Labor Act[171] and existing bargaining agreements for the purpose of amending said bargaining agreements.[172]

Flight control. In regard to the control of interchange flights, each of the parties to an interchange agreement assumes full responsibility for and control of the operation of interchange aircraft and crews over its own routes. This control includes such functions as dispatch, flight plan clearance, communications, navigation and weather facilities and services, and the handling of passengers, freight, express, and mail.

Each carrier also controls the utilization of the payload space over its own routes; however, in keeping with the principal purpose of interchange service, *viz.*, to provide the public with through service, through traffic is always given preference over local traffic. Furthermore, no party to an interchange agreement has the right to determine whether any flight of another party shall be operated or cancelled, either in whole or in part. In addition, operation and control of the interchange flight by one party over the route of another party is permissable only in emergencies, when it is impossible to accomplish the

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[170] *Capital Airlines, Inc.—National Airlines, Inc., Interchange of Equipment*, 10 CAB 239 (1949).

[171] These procedures are to be found primarily in Section 6 (45 U.S.C. 156) thereof which covers written notification of intended change in bargaining agreements, continuation of existing working conditions during negotiations, and the use of the National Mediation Board. Section 410 of the Civil Aeronautics Act makes compliance with Title II of the Railway Labor Act a requirement for certificated air carriers.

[172] See for example: *Capital Airlines, Inc.—National Airlines, Inc., Interchange of Equipment*, 10 CAB 238-246, 254 (1949); or *Delta Air Lines, Inc.—American Air Lines, Inc., Interchange of Equipment*, 10 CAB 761 (1949).

interchange at the designated interchange point. In such cases the interchange flight may proceed to an alternate airport. If it is determined that an unreasonable delay would result from changing crews at the alternate airport, the flight crew making the emergency landing may be directed, subject to flight time limitations, to proceed to the next change point.[173]

So that there will be no misunderstanding in the minds of the traveling public as to whose routes they are flying over, the CAB requires that a sign be displayed in each interchange aircraft showing which carrier is operating and controlling the flight.[174] Interchange carriers also indicate plainly in their schedules that the interchange flight is operated over the combined routes of two or more carriers.

Revenue and cost distribution. In addition to the delimitation of responsibilities covering equipment, personnel, and flight control, interchange agreements also stipulate the manner in which revenues and costs are to be distributed among the interchange partners.

Revenue from interchange operations is usually to be acquired and distributed in the same manner as if there were merely connecting service. Fares, rates, charges, and rules applicable to interchange service are to be determined and published by the interchange carriers in the same way as for normal single carrier services. In accordance with normal procedures, fares are to be calculated by adding the fare applicable over the route of one interchange partner to that applicable over the route of the other or others, or, where a lower fare exists between the same pair of points over a more direct route, by meeting such a fare in order to be competitive. In the latter case, the revenues derived from the depressed fare are prorated among the interchange partners.[175]

In addition to providing that each carrier should receive the revenues earned over its own routes, an interchange agreement normally stipulates that each also bear the expenses entailed in the operation of the interchange flight over its own routes. This means in effect that each carrier bears direct and indirect costs as well as overhead for that part of the operation performed over its routes. When an interchange aircraft is being operated by the lessee, certain costs are met through payment of a monthly rental to the lessor. This rental charge usually covers depreciation of aircraft and accessory equipment plus overhaul costs. Depreciation normally is computed by multiplying the hourly depreciation rate for each aircraft used in the interchange operation by the hours it is in the possession of the lessee during the month. Overhaul charges are usually computed by multiplying the overhaul charge per hour for each aircraft used in the interchange operation by the hours said aircraft was flown by the lessee during the

[173] *Pan American-Panagra Agreement*, 8 CAB 53-54 (1947); *Delta Air Lines, Inc.—American Air Lines, Inc., Interchange of Equipment*, 10 CAB 764-766 (1949); *Transcontinental & Western Air, Inc.—Delta Air Lines, Interchange of Equipment*, 8 CAB 858, 871 (1947).

month. As a rule, the cost of replacement of parts of aircraft and equipment, except where necessitated by damage caused by the lessee, is included in the overhaul charge.[176]

The rental charge, which is intended to constitute a return to the lessor upon his investment in the aircraft for the period during which it is in the lessee's possession, is subject to change from time to time in accordance with changes in the cost experience of the carriers. Normally, it is subject to periodic review at the end of each quarter.[177]

When approving provisions in interchange agreements for the distribution of revenues and costs, the Civil Aeronautics Board makes clear that its approval may not be considered to be a determination for rate-making purposes of the reasonableness of any of the costs or charges claimed under the terms of an interchange agreement.[178] Furthermore, the Board maintains rather close scrutiny of the manner in which revenues and costs are distributed even after an interchange arrangement is in operation. Any changes in accounting under an interchange agreement, even though considered minor by all parties to the agreement, must be reported to the Economic Bureau of the CAB in accordance with Section 407 of the Civil Aeronautics Act, governing the filing of reports.[179]

Modification, supplementation, and termination of the agreement. Interchange agreements primarily contain certain general and basic arrangements. Many of the details of a proposed interchange operation may not appear in the original document at all, but will be left to be worked out in supplemental agreements, if and when the Civil Aeronautics Board approves the initial, basic agreement. Furthermore the Board may condition its approval on the requirement that certain modifications be made to the interchange agreement. Modifications also may be sought later either by the CAB or the parties to the agreement, themselves, in the light of changing conditions. All such additional agreements which supplement or modify the initial interchange agreement must be filed with the Civil Aeronautics Board for its approval. When granting its approval to the initial, basic interchange agreement, the Board usually stipulates that the filing of modifying or supplementing agreements must be made a specified number of days prior to their proposed effective dates. The period usually specified is 15 or 20 days.[180]

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[174] See for example: *United A. L.—Western A. E., Interchange of Equipment*, 1 CAA 724 (1940); or *Pan American-Panagra Agreement*, 8 CAB 54 (1947).

[175] Examples: *Transcontinental & Western Air, Inc.—Delta Air Lines, Inc., Interchange of Equipment*, 8 CAB 871 (1947); *Delta Air Lines, Inc.—American Air Lines, Inc., Interchange of Equipment*, 10 CAB 765 (1949).

[176] See for example: *Transcontinental & Western Air . . ., ibid.*, pp. 858, 872.

[177] *Delta Air Lines, Inc.—American Air Lines, Inc., Interchange of Equipment*, 10 CAB 766 (1949).

[178] Examples: *Capital Airlines, Inc.—National Airlines, Inc., Interchange of Equipment*, 10 CAB 254-255 (1949); CAB Serial Order No. E-5337, Docket No. 1102, May 1, 1951, p. 9.

[179] *Pan American-Panagra Agreement*, 8 CAB 64 (1947).

[180] See for example: CAB Order Serial No. E-5778, Docket No. 4926, October

In addition to reserving for itself the power to modify at a later date an interchange agreement it approves, the Board also reserves for itself the right to terminate the agreement, if at any time it finds that the continued operation of interchange service under the terms of the agreement would be adverse to the public interest, or in violation of the Civil Aeronautics Act or any rule, regulation, or order of the Board. The parties to the agreement, themselves, also may terminate the agreement at any time, subject only to written notice and CAB approval. The written notice requirement in interchange agreements usually stipulates a period of either 30 or 60 days.[181]

Control of schedules and service. In addition to its power to modfy, supplement, or terminate the interchange agreement itself, the Civil Aeronautics Board exercises continuing control over interchange operations under its authority to approve or disapprove schedules and service. All proposed interchange schedules are required to be filed with the Board and served on each carrier serving a city on the proposed schedule 15 days in advance of their effective date. Operations on such schedules cannot begin unless approved by the Board. Interchange schedules are set up jointly by the partners in the interchange operation. No one carrier is permitted to exercise control.[182]

In regard to the Civil Aeronautics Board's control over the adequacy of the service provided in the interchange operation, its approval of the agreement is contingent upon the airlines rendering adequate through service to each city served under the agreement.[183] Service under an interchange agreement can neither be suspended nor extended to additional cities without prior approval by the CAB. Furthermore, such service details as are involved in the ticketing and handling of passengers, the billing of cargo, etc., must be in accordance with standard interline forms and procedures.

As clearly indicated by the foregoing, the Civil Aeronautics Board's regulation of interchange service is extensive and detailed. Its power to control the terms of the interchange agreement and all service performed thereunder is adequate to enable it to shape interchange operations in the pattern which best serves the public interest.

Conclusions

Interchange service among the airlines of the United States has had a relatively recent history. Although the first interchange opera-

10, 1951, p. 1; or CAB Order Serial No. E-7030, Docket No. 4656, December 16, 1952, p. 1.

[181] Examples: *Transcontinental & Western Air, Inc.—Delta Air Lines, Inc., Interchange of Equipment*, 8 CAB 859, 873 (1947); *Delta Air Lines, Inc.—American Air Lines, Inc., Interchange of Equipment*, 10 CAB 761, 767 (1949).

[182] CAB Order Serial No. E-1634, Docket No. 2346, May 28, 1948; *Capital Airlines, Inc.—National Airlines, Inc., Interchange of Equipment*, 10 CAB 254 (1949); *Delta Air Lines, Inc.—American Air Lines, Inc., Interchange of Equipment*, 10 CAB 761, 766 (1949).

[183] See for example: CAB Order Serial No. E-5778, Docket No. 4926, October 10, 1951, p. 2; CAB Order Serial No. E-5337, Docket No. 1102, May 1, 1951, p. 9.

tion performed by United States' airlines was inaugurated in 1940, considerable recognition of interchange of equipment, as a desirable method of providing new through service, has only appeared in recent years. In 1948, only one domestic interchange service was in operation. In contrast, nine out of the thirteen domestic trunklines were operating a combined total of eleven interchanges over nearly 25,000 route-miles daily at the end of 1953.

The impetus given the development of interchange service in recent years can be attributed primarily to the encouragement it has received from the Civil Aeronautics Board. The "over-expansion" of airline capacity in the early post-World War II period, which subsequently led to a severe financial set-back for the airline industry, caused the Board to adopt a restrictive attitude toward the authorization of new routes, beginning in the late 1940's. As a substitute for route expansion, it encouraged the use of interchange of equipment to provide new through service where the public interest justified it. Recently, however, there have been signs that the Civil Aeronautics Board's restrictive attitude toward route awards may be undergoing change. Several major route cases are currently on the Board's active docket, and new route awards appear to be imminent. There appears to be real danger that in spite of its recent growth interchange service may be relegated to a secondary role in the development of the air transportation system and may not receive the recognition and wide use it merits.

The provision of new through service is deemed to be in the public interest. An economically sound air transportation industry is also in the public interest. One objective cannot be sought to the exclusion of the other. Both are essential. Interchange of equipment offers the best available method for facilitating the attainment of an optimum balance between the two, *i.e.*, a balance which will maximize the net benefit to the public.

New through service may be provided in three ways, *viz.*, route expansion, interchange of equipment, and consolidation of airlines. The amount of new through service which may be expected to be forthcoming from future consolidations of existing airlines is small. New through service must come primarily from the other two methods.

Both route expansion and interchange are essential. Nevertheless, interchange of equipment has certain fundamental advantages that recommend its wider use. New routes mean new ground facilities. Interchange, on the other hand, utilizes existing facilities. New routes mean diversion of traffic from air carriers already providing service to the cities in question over connecting routes. Interchange service, on the other hand, is provided by airlines already carrying some or all of the existing traffic over their connecting routes, thereby minimizing the diversion of traffic that may result from the new through service. Furthermore, once granted, a route tends to become a permanent franchise, whether or not it continues to be economically justified in the

future. Interchange service, on the other hand, offers a maximum of flexibility. It may be speedily terminated by the Civil Aeronautics Board or the carriers should the circumstance ever warrant such action.

The Civil Aeronautics Board has acknowledged the economic benefits to be derived from the use of interchange of equipment to provide new through service and has encouraged its use. In addition, it has effectively controlled interchange arrangements through its power to approve or disapprove agreements between air carriers for pooling of equipment. A workable pattern of regulation for interchange service has been successfully established. Furthermore, although the Board has never seen fit to exercise such power, it appears to have the authority to compel interchange arrangements between unwilling carriers should it deem the interchange service in question to be required by the public interest.

The Board's power to compel interchange if necessary permits the introduction of a great deal of reform into the air route pattern, should the Board choose to use it. In the past, the Board has not found such action necessary. Its policy of refusing to grant new routes while encouraging interchange arrangements as a substitute has been effective. It is desirable that this policy continue and receive even greater implementation in the future. Interchange of equipment can be the Civil Aeronautics Board's most effective tool for giving the public new through service, while fashioning an economically sound air transportation system in the United States.

TABLE 5

INAUGURATION DATES OF INTERCHANGE SERVICES

Interchange Carriers	*Interchange Cities*	*Month Service Began*
1. Pan American/Panagra	Balboa, C. Z.	June 1947
2. Delta-C&S[1]/TWA	Cincinnati	June 1948
3. Delta-C&S[1]/American	Dallas	September 1949
4. Capital/National	Washington	April 1951
5. American/Delta-C&S[1]/ National	Dallas and New Orleans	May 1951
6 American/Continental	El Paso	October 1951
7. Braniff/Eastern	Memphis	December 1951
8. Braniff[2]/Eastern	St. Louis	January 1952
9. Braniff[2]/Continental	Kansas City	February 1952
10. TWA/Delta-C&S[3]	St. Louis and Memphis	April 1953
11. United/Braniff	Denver	September 1953
12. United/Continental	Denver	September 1953

[1] Delta was original interchange partner before merger.
[2] Mid-Continent was original interchange partner before merger.
[3] C&S (Chicago & Southern) was original interchange partner before merger.

FEDERAL LICENSING OF AIRPORTS

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THIS article is directed primarily to the need and merits of Federal licensing and the constitutionality of Federal licensing of airports. The idea of licensing of airports by the Federal Government is not new. The problem was pointed up, however, and considerable interest was renewed following several airplane crashes in the vicinity of airports in the New York area, particularly at the Newark airport. These accidents kindled the spark of investigation and General Doolittle was appointed by President Truman to be Chairman of a Commission to explore the problem of airports, taking into consideration safety, general welfare and the National Defense.

On May 16, 1952, the Commission submitted its report, "The Airport and Its Neighbors." At the same time, there was prepared a legal study of some of the problem involved which study was entitled. "The Legal Framework of Airport Operations."[1] The Doolittle Commission reported 25 recommendations, number 9 of which reads as follows:

> "Extend Civil Aeronautics Act to certificate airports. The Civil Aeronautics Act should be amended to require certification of airports necessary for interstate commerce and to specify the terms and conditions under which airports so certified shall be operated. Certificates should be revoked if minimum standards for safety are not maintained. Closing or abandonment of an airport should be ordered or allowed only if clearly in the public interest."

Thereafter, and in the Second Session of the 82d Congress, Senator Edwin C. Johnson of Colorado introduced a bill S.3371 to carry out the above recommendations, which bill was "To Promote Safety in Air Transportation by Amending The Civil Aeronautics Act of 1938, in Order to Require Certain Airports to be Certificated Under the Provisions of Such Act in Accordance with Recommendations of the President's Airport Commission." While the Bill S-3371 was shelved, it was not in conflict with later recommendations of the Airport Panel on the National Airport Program.[2]

A companion bill to S. 3371 was an earlier introduced Bill S. 3129 of the same Congress which had as it purpose the removal of existing obstructions and the prevention of future obstructions to Air Naviga-

[1] Pogue and Bell, 19 Jour. of Air Law, C. 253 (Summer 1952).
[2] The National Airport Program, 83d Congress, 2d Session, Sen. Doc. 95.

tion. This Bill was intended to be enabling legislation for a National Zoning Program, a counterpart to the Certificating (Licensing) Program.

In 1953, Mr. D. M. Proctor, President of the National Municipal Association, reported to President Eisenhower his concern over the failure of Congress to advance vitally needed airport appropriations and said,

> ". . . while airports are a great public benefit to the cities they serve, their major benefit is to the Nation. Airports are vital to the Nation and to the progress of our Country. . . ." [3]

Policy of Present Administration

The Civil Air Policy of the present Administration is contained in a document by that title issued in May 1954. In commenting upon the Federal role in airports, no mention is made of Federal licensing of airports. The omission of comment and the general tenor of the statements indicates that Federal licensing has not been favored by the present Administration.

On January 17, 1955, there was released by Senator John W. Bricker an Aviation Study prepared for the Committee on Interstate and Foreign Commerce of the United States Senate in connection with its hearing on S. 2647 of the 83rd Congress. This very important omnibus aviation bill has many interesting points. In this instance, an effort will be made to mention only such points contained therein as have a bearing on the question of the Federal licensing of airports. The Study indicates that the effect of the changes proposed in S. 2647 would be to eliminate the present slight measure of uncertainty on the question of safety regulations and provide specifically that total responsibility of safety regulation of aviation lies with the Federal Government. It is the contention of the authors that there is more need for clarification of safety regulations at, near and in airports than elsewhere.

Section 601 (a) of the Civil Aeronautics Act of 1938, which imposes the duty on the CAB and the CAA to promote safety of flight in air commerce, has been interpreted as including a mandate to prescribe also safety regulations for persons and property on the ground.[4] S. 2647 proposes an amendment which would specifically so provide. The Aviation Study appears, at one and the same time, to say this proposal seemed unnecessary but that the importance of this matter may be such that it would be useful to add a provision to make clear beyond question that the aims of safety regulations include the protection of persons on the ground.

Of particular significance are the proposals of S. 2647 to substitute the term "air navigation" for the term "air commerce" and to substitute the term "Federal Airway" for the term "civil airway. The term

[3] Municipal L. R. 1954, page 62.
[4] Aviation Study, Committee on Interstate and Foreign Commerce, Sen. Doc. 163, 83d Congress, page 76 (1955).

"air navigation" is proposed to mean, among other things, the operation or navigation of aircraft in commerce or otherwise upon any airport in the United States or in the airspace over the United States. It is also significant to note that the proposal to use the term "air navigation" as it is defined calls for an amendment to Section 2, the Declaration of Policy of the Civil Aeronautics Act of 1938 so that there shall be considered, among other things, as being in the public interest.

> **"the regulation of air navigation as to best promote its development and assure the highest degree of safety."**

And it is also significant that the public right of transit as granted by Section 3 of the said Act would be amended by the substitution of the term "air navigation" for the term "air commerce" which broadened term, it is to be remembered, includes airports. It appears that the proposal to substitute the term "Federal Airway" for the term "civil airway" would broaden Federal jurisdiction to include traffic control areas which extend beyond the paths of present civil airways.

The foregoing is believed to be a fairly accurate but not all inclusive summary of the question of Federal licensing of airports which gained a short-lived activity following the report of the President's Airport Commission in 1952, and which is presently coming to the fore again.

While the authors hold no brief for the details and form of the abovementioned Bills S. 3371 and S. 3129 of the 82d Congress and S. 2647 of the 83d Congress, it is submitted that any such proposed legislation is not actually an extension of Federal control, but that such would be merely a continued exercise of an already clearly established Federal power. Such legislation is not only proper but necessary. It cannot be reasonably argued that the field of airport operation, in terms of standards of safety, can be regarded as distinct and apart from the regulation of actual operational flights or travel through navigable airspace, over which Congress has clearly established exclusive Federal jurisdiction, and may in the near future more clearly define.

Before offering to substantiate legally, the position the authors have taken in this article, there are some other points of general public interest which should be noted.

Importance of the Airport

Air travel has outgrown airports, planes and routes, and there exist traffic jams in the sky. This phenomenal growth with its resulting problems is obvious to the air traveler and studies are being made.[5] Airports serve two well-known and understood functions. One is transportation and the other is National Defense. While all forms of transportation serve National Defense, aviation probably plays the most important part of transportation in our National Defense.

The military has consistently stated that it cannot perform its func-

[5] Special CAR—Reg. #SR 408 (Oct. 20, 1954).

tion of defending our country from attack if it must rely solely upon military airports and military aircraft and navigation facilities. No one disagrees with this conclusion and it is therefore clear that in considering the airport problem we cannot separate into two separate compartmets the Military Airport Problem ad the Civil Airport Problem. Further, it is axiomatic that our country must not only have adequate airports but airports properly located.

Here is a good place to recall the Government's legislatively declared policy on aviation, as set forth in Section 2 of the Civil Aeronautics Act of 1938.[6]

> "In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity —
>
> (a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;
>
> (b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportations, and to improve the relations between, and coordinate transportation by, air carriers;
>
> (e) The regulation of air commerce in such manner as to best promote its development and safety; and
>
> (f) The encouragement and development of civil aeronautics."

The policy clause of the Civil Aeronautics Act of 1938 must ever and always be kept in mind.

It is of little use to have control over the flight of aircraft through the air if one cannot get them down on the ground. As a matter of fact, from the standpoint of safety, the airport and operations in the area above and around the airport, create the greatest problem. Accident statistics show that by far the greatest number of accidents and the greatest losses occur on and in the vicinity of airports.[7] There is no dispute but that landing and take-offs are the two most critical operations.

As some examples of what occurs when the Federal Government does not fulfill its obligation in air commerce, we observe the fiasco in Texas involving the fight between the cities of Dallas and Fort Worth over air terminal facilities. In the Capital of our Nation, we find a civilian, a Navy and two Air Force fields creating serious problems of safety and reducing the quantity of commercial air transportation because of their proximity to each other and of the civil airport. The problem is not diminishing, but is expanding because of the faster speed of aircraft and the increasingly difficult problems created by speed. This is not the place to outline in detail all of the factors in-

[6] Pub. Law 706, 75th Cong., Act of June 23, 1938; 49 USC 402.

[7] CAB Statistical Analysis of Non-Air-Carrier Accidents 1953, issued July 1, 1954.

volved, but it is sufficient to state that these problems which all revolve around airports are some of, if not the most serious, now facing aviation.

A study of the history of the High Density Air Traffic Control Program instituted by the CAB and the CAA for Washington National Airport discloses how serious and far-reaching this problem is. A public hearing which lasted two days was held by the CAA on February 15 and 16, 1955, concerning the proposal of the CAA to establish a "High Density Air Traffic Zone" in the Washington, D. C., area. Testimony was offered by all the main users of the airspace. At the time this is written, the CAA has not issued its final determination of the problem.

We must now recognize that the strength of our National militarily and our ability to compete and hold our own in the family of Nations economically is tied directly to the strength and progress of our aviation. We are in a field where there can be no compromise with any thing less than the best. We assume that as a Nation we have the intelligence and we know we have the resources to assure the highest possible strength and efficiency and usefulness for both our Civil and our Military aviation.

The orderly development of our irport program to insure the necessary coordination between the Civil and Military phases requires that our airport program be a unified one with a minimum of waste and a maximum of availability and usefulness. Such results have never been achieved except where a single Government agency has assumed the responsibility. Even highway networks have been found wanting from the National standpoint and Federal participation has been considered increasingly important. It seems to us that Federal licensing of airports is an absolute necessity if we are to reach and maintain our goal.

Meaning of "Navigable Airspace"

Returning to the Civil Aeronautics Act of 1938 and the extent of the control exercised by Congress in that Act, let us look at the phrase, "Navigable Airspace." The lawmakers undoubtedly used the word "navigable" with the word "airspace" because of the meaning that word had been given with respect to navigable waters. With respect to airspace, it is obvious that airspace that at one time would be considered non-navigable, now with the advent of the helicopter, convertoplanes and the vertical take-off planes, is clearly navigable. In other words, what was not navigable even yesterday is navigable today. There was a lag in the Federalization of inland water transportation[8] and it is hoped that such will not continue in air transportation, as air as an element in which to navigate is even more inevitably Federalized by the Commerce clause than is navigable waters.

But casting aside all these refinements, it seems clear that all of

[8] Knauth, *Crime in the High Air*, Vol. XXV, Tulane L. R. 446 (June 1951).

the airspace necessary to land, take-off and adequately maneuver for landing and take-off is in fact navigable airspace. It is not only navigable, but it must be maintained navigable if we are to maintain any semblance of a sound aviation industry. Even the wildest opponents of Federal control do not claim you can operate an airport in non-navigable airspace. Congress has exercised exclusive jurisdiction over that and it must continue to do so if it is to fulfill its obligations.

As the authors have indicated, it is their position that in the interests of National Defense, public welfare, safety and uniformity, airports must be Federally licensed. While we have reached the point of traffic jams in the sky, it is the airport which causes such traffic jams because some of the most technical and skillful phases of flying take place in the take-offs and landings from the airpotrs. It is to the airport and its runways and facilities that civil airways extend.

Federal airways do not stop at some unsettled number of feet above or away from the airport. Logically and of necessity, they extend down and into the airport. It has judicially been said by the Supreme Court of the United States that the moment a ship taxies onto a runway it is caught up in an elaborate and detailed system of controls which are controlled solely by the Federal Government.[9]

It is high time that it be stated that it is equally, if not more important from the standpoint of safety, for the Federal Government to supervise and regulate the landings and take-offs of airplanes than for instance the flight of airplanes after they have leveled off on their course high above the ground and far from the airport. There are those who have not thought the matter through who believe that, by licensing and certificating the airplane and for an all inclusive word, its handlers, the Federal Government need go no further.

Those who have studied the problem without thought of politics or fear of criticism and with the sole objective of obtaining the best possible facilities for air commerce have concluded that airports should be Federally licensed. This was the conclusion of the President's Airport Commission mentioned above. The Airline Pilots Association revealed at its Air Safety Forum in Chicago, in March 1954, that a comprehensive airport analysis sheet is being compiled in support of the Association's recommendation that airports be certificated. It may well be that further delays in following such recommendations will cause greater loss of lives and greater catastrophies. Delay will certainly increase the cost of aviation.

State-Federal Problem

The problem is complicated by some misconceptions and prejudices. There are those who would see great violation of States' rights. Then there exists timidity on the part of Government officials to carry out the law as it now stands. Lack of Federal appropriations permit a status quo.

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[9] *Northwest Airlines v. Minn.*, 322 US 292 (1944).

The Congressional declaration of intent and interpretation of Federal authority over the airspace is contained in Section 6, paragraph (a) of the Air Commerce Act of 1926. That section states:

> "The United States of America is declared to possess and exercise complete and exclusive National sovereignty in the airspace above the United States, including the airspace above all inland waters and the airspace above those portions of the adjacent marginal high seas, bays, and lakes, over which by International law or treaty or convention the United States exercises National jurisdiction. . . ."

In 1930 in the Second National Airport Conference held on May 14th of that year, it was pointed out by the Committee on Traffic Handling that

> "Federal control over all traffic movements would probably be the simplest method of adoption and enforcement." [10]

Another expression of Congressional authority is contained in Section 3 of the Civil Aeronautics Act of 1938. That section reads:

> "There is hereby recognized and declared to exist in behalf of any citizen of the United States, a public right of freedom of transit in air commerce through the navigable airspace of the United States."

It is enlightening to note that the Civil Aeronautics Board in 1941 concluded that it must, in carrying out the provisions of the Civil Aeronautics Act of 1938, exercise jurisdiction over all of the navigable airspace. It further, at that time, determined that all of the airspace in which an aircraft could be maneuvered was navigable.[11] At that time, the Board after a factual investigation and public hearing in September 1941 determined that all aircraft in the air constituted an "operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas ,or foreign air commerce," and thus constituted "air commerce." This administrative determination was sustained in *US vs Drumm, et al.*[11a] When this interpretation is applied to Sections 610 of the Civil Aeronautics Act of 1938, it imposes the requirement that every aircraft that gets off the ground have an airworthiness certificate and every person who pilots an aircraft or serves in the capacity of an airman have a proper Federal airman certificate. The *Rosenhan case* was confined to a civil airway but it supports the above conclusion.[12]

This interpretation has been uniformly applied since 1941, and so far as we know has never been successfully challenged. As a matter of fact, it has been, for the most part, accepted and considered as a proper and beneficial construction of the law.

One of the authors participated in the complete revision of Part 60 of the CARs by the Civil Aeronautics Board in 1945. In drafting the minimum altitude rules (Section 60.17) there was no intention ex-

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[10] Proceedings of the Second National Airport Conference of 1930, p. 65.
[11] CAR, Regulations Serial #193, Amendment #135, effective Dec. 1, 1941.
[11a] *U.S. v. Drumm*, 55 F. Supp. 151, 1 AVI 1177 (DC Nev. 1944).
[12] *Rosenhan v. U.S.*, 131 F. 2d 932, 318 US 790; cert. denied (1943).

pressed by any participant in the drafting that these rules were definitions of the "navigable airspace" term used in the Civil Aeronautics Act of 1938. All of the discussions were on the question of what minimum altitudes should be specified to protect the persons on the ground as well as those in the air. The rule was intentionally drafted to permit aircraft to be flown at any altitude between zero and 500 feet when such flight would not endanger the person or property of another. The revision of the rules at that time was a departure from Government paternalism and gave a pilot freedom to operate with risk to himself so long as he was not endangering another.[12a]

A recent expression of the Civil Aeronautics Board concerning the meaning of the term navigable airspace is contained in Interpretation No. 1 of Part 60, adopted July 22, 1954.[13] In that the Board construes the words

> "except when necessary for take-off or landing, no person shall operate an aircraft below the following altitudes,"

which words are contained in Section 60.17 of the Civil Air Regulations, as establishing a minimum altitude rule. In its interpretation of that rule, the Board states:

> "It is a rule based on the standard of necessity, and applies during every instant that the airplane climbs after take-off and throughout its approach to land. Since this provision does prescribe a series of minimum altitudes, within the meaning of the Act, it follows, through the application of Section 3, that an aircraft pursuing a normal and necessary flight path in climb after take-off or in approaching to land is operating in a navigable airspace."

Interstate Commerce Clause

All of the above is an application of the Interstate Commerce Clause of the Constitution. The full extent of the Federal Government's control over the airspace has not yet been determined by the Supreme Court. Those cases which have reached it have given that Court an opportunity to discusss the general issue as well as the specific issue and the language of the Court is significant. For instance, in *Northwest Airlines v Minnesota, supra,* the Court stated:

> "Air as an element in which to navigate is even more inevitably Federalized by the Commerce Clause than is navigable water. Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time. Congress has recognized the National responsibility for regulating air commerce. Federal control is extensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by Federal permission, subject to Federal inspection, in the hands of Federally certified personnel and under an intricate system of Federal commands. *The*

[12a] Article entitled *The New Rules for Private Flying*, by L. Welch Pogue, former Chairman of the Civil Aeronautics Board, in Skylady magazine, Sept./Oct. 1945.

[13] 19 F. R. 4602. It is believed that CAB issued this interpretation because of confusion resulting from the case of *All. Am. Airways v. Village of Cedarhurst*, 201 F. 2d 273 (CA 2, 1953).

> ***moment a ship taxies onto a runway, it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower; it travels on prescribed beams; it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any State Government."*** (Emphasis supplied)

Authority to License Airports

Now what may be the authority for licensing of airports under Civil Aeronautics Act of 1938? Section 606 of the Act authorizes the Administrator

> "to inspect, classify, and rate any air navigation (facility) available for the use of Civil aircraft of the United States, as to its suitability for such use. The Administrator is empowered to issue a certificate for any such air navigation facility."

Section 1, paragraph (7) of the Act defines an air navigation facility as

> "any facility used in, available for use in, or designed for use in, aid of air navigation, including landing areas. . . ."

Paragraph (22) of that Section defines landing areas as

> "any locality, either of land or water, including airports and intermediate landing fields which is used, or intended to be used, for the landing and take-off of aircraft, whether or not facilities are provided for the shelter, servicing, or repair of aircraft, or for receiving or discharging passengers or cargo."

Going further, Section 302 (a) of the Act authorizes the Administrator

> "(1) to acquire, establish, and improve air-navigation facilities wherever necessary;
> (2) to operate and maintain such air-navigation facilities."

This authority is useless without funds and it is probable that emergency landing fields were contemplated by the authorities rather than regular commercial airports. The language is clear, however, and all possible ambiguity removed by Section 302 (c) which states the Administrator is authorized

> "to acquire by purchase, condemnation, lease, or otherwise, real property or interests therein, including, in the case of air-navigation facilities (including airports) owned by the United States and operated under the direction of the Administrator, easements through or other interests in airspace immediately adjacent thereto and needed in connection therewith."

Section 303 of the Act refers also to the acquisition and certification of landing areas by the Administrator. Section 307 directs the Administrator to make plans for the

> "orderly development and location of landing areas . . . as will best meet the needs of, and serve the interest of safety in, Civil aviation."

Whether a certificate as used in the Act is a license may involve some legal refinements not pertinent to this discussion. We consider that, under the Act, the use of an airport not certificated might be prohibited in the same manner as the use of an uncertificated aircraft. This is the purpose of licensing.

It seems clear enough that airports may be certificated under the Civil Aeronautics Act of 1938. Under the literal interpretation of the Act, the authority extends to all airports available for the use of Civil aircraft in the United States. This, at first glance, seems sweeping, but when one considers that all aircraft must conform to Federal Regulations, there seems no basis for the distinction as to airports. So far as civilian operations are concerned, neither the aircratf nor the airport is of any use without the other.

Judicial Decisions Noted

Since the effort and thinking which went into the Air Commerce Act of 1926 and the Civil Aeronautics Act of 1938, there have been various judicial decisions which should be noted. Under the authority of *Euclid v Ambler*[14] the "airport area" was regulated through zoning by the Municipality or the State. The Civil Aeronautics Administration has required adequate zoning laws or other protective means before any airport projects under the Federal Airport Act of 1946 are approved.[15]

And there appears to be adequate power in the Federal Government to regulate the height of present and future structures about airports through eminent domain and possibly zoning. In the case of *Jasper v Sawyer,* it was stated by Judge Holtzoff:

> "It is settled by decisions of the Supreme Court, beyond peradventure of doubt, that the United States is clothed with the power of eminent domain: Even though the power was not expressly conferred by the Constitution, the power is implied and is incidental to carrying out other powers, *Kohl* v *US*, 91 US 367, 23 L Ed 449. The right of eminent domain which exists in the Federal Government may be exercised by it within the States, so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution. Under its power to regulate commerce between the States, as well as foreign commerce, it is fundamental that Congress may construct, maintain and operate instrumentalities of such commerce."
> "... It is clear that in the light of modern developments an airport is an instrumentality of both foreign and interstate commerce. . . .
> ". . . The Court feels that it is beyond the realm of debate that an airport is as much an instrumentality of commerce as a highway, a bridge, a lock, a dam, a lighthouse, all of which have been constructed at various times in different places under the authority of Acts of Congress acting under the authority of Acts of Congress acting under the commerce power." [16]

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[14] 272 US 365 (1926).
[15] Fed. Airport Act 49 USC 1101; Regulations of the Administrator of Civil Aeronautics, Part 550, Sec. 550.11(b)(3), Part III, #7.
[16] *Jasper v. Sawyer,* 100 F. Supp. 423 (DC, DC 1951).

Similarly, it might be argued that the Federal Government has the power to zone, (although the question has never been judicially determined). The constitutional basis for Federal zoning laws which would limit the height of structures in airport approaches is the protection of air commerce, the flow of which, being subject to direct regulation, must be aided also by indirect regulation where this is necessary to maintain the effectiveness of the original laws. The Government's sole authority has been to protect the flow of commerce, except as noted above with respect to the interpretation of Section 601 (a), the Civil Aeronautics Act of 1938.[17]

It must also be remembered that State Laws and Police Regulations must yield when they come into conflict with the National power over commerce.[18]

With respect to Interstate Commerce, postal service and matters of National Defense, jurisdiction over passage through the air may be said to have been expressly or implicitly surrendered by the States to the United States by the adoption of the Federal Constitution. It has been held that, insofar as these Regulations established by the Federal Government promote safety and efficiency in interstate, overseas or foreign commerce and bear some reasonable relationship to the subject matter, they are supreme and may not be denied.[19]

The power of Congress to legislate on that which affects Interstate Commerce was clearly upheld and reaffirmed in the case of *Rosenhan v United States, supra,* which showed that safety regulations apply to all who enter an airway. The Court said that since the Defendant admitted he was operating in an Interstate Airway, he was subject to safety regulations even though there was no present danger from his being there at the particular time. Congress sought to eliminate all potential dangers, and therefore it assumed control over all flights within an Interstate Airway. A later case went even further and stated that any flight in United States airspace could be controlled by the Civil Aeronautics Board Regulation.[20] This case seemed to hinge upon the application made of the Civil Aeronautics Act definition of "air commerce." The Civil Aeronautics Act of 1938 gave the Civil Aeronautics Board power to make regulations for flights that "may affect or endanger" Interstate Commerce. Congress has the power to regulate Intrastate Commerce where it affects Interstate Commerce, and its occupation of the field gives the Federal Government exclusive regulatory control over those phases upon which it has acted.[21] Any State Regulation which conflicted with Federal Regulation would be an unconstitutional burden on Interstate Commerce, and even though the State may have acted in the field first, it cannot exclude Federal

[17] Footnote 4, *Supra.*
[18] *People v. Katz,* 249 NYS 719 (1931).
[19] *Rosenhan v. U.S., Supra, Blalock v. Brown,* 78 Ga. App. 537, 51 SE 2d 610 (1949).
[20] *Drumm v. U.S.,* 55 F. Supp 151 (DC Nev. 1944).
[21] *International Shoe v. Pinkus,* 278 US 261 (1928).

occupation. As stated by Chief Justice Stone in *United States v Wrightwood Dairy Co.*,[22]

> "No form of State activities can constitutionally thwart the regulatory power granted by the Commerce Clause to Congress."

Thus, if the subject of the regulation is such as to require uniformity among the States as to air commerce, the power of Congress must be deemed exclusive. The obvious need for regulation of Civil aviation in all phases of its operation, including the establishment and enforcement of minimum standards of safety in the maintenance and operation of airports, clearly demands uniformity in such regulation. Such uniformity can be achieved only at the National level.

Even if the subject were such as to admit of diversity of regulation, it seems clear that a State may regulate only until Congress has occupied the field. In this situation, Congress must clearly indicate its intent to occupy the field,[23] and when clearly expressed, the State Regulation ceases.[24] Not only may such repeated expressions of an intent to occupy the field of regulation of safety in Air Commerce activities be inferred from the past rulings and regulations of the Civil Aeronautics Board, and from the broad scope of the Civil Aeronautics Act of 1938, but a further expression of intent with respect to the regulation of airport standards of safety was set forth in express terms in S. 3371 and is now set forth in S. 2647.

It seems obvious that State Laws in this field of airport licensing would be a burden on Interstate Commerce, and whether or not they are of such an unreasonable burden as to render them unconstitutional is beside the point, once it is realized that the magnitude sought to be governed is such that effective Safety Regulations can be achieved only if uniformly applied and that such uniformity can emanate from Federal legislation alone.

The cases mentioned above dealing with navigable airspace put no exact measurement on the same. The cases say that navigable airspace is within the exclusive jurisdiction of the Federal Government all as the authors have endeavored to trace.

While the case of *United States v Causby*[25] is generally quoted as being consistent with the foregoing indicated trend, the authors believe the case actually represents a stumbling block and reflects the timidity of Federal officials and the resurgence of States right thinking at the time of the decision. While the opinion does hold that the air is a public highway as Congress has declared and that common sense revolts at the idea that ownership of lands extended up to the sky, the majority opinion went on and held that navigable airspace was that space above the minimum altitude set for cross-country flight as dis-

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[22] 315 US 110 (1942).
[23] *Missouri Pac. Ry. Co. v. Norwood*, 283 US 249 (1930).
[24] *Chicago R. I. & P. R.R. Co. v. Hardwick Farms Elevator Co.*, 226 US 426 (1913).
[25] 328 US 256 (1946).

tinguished from the safe-glide angle set for take-off and landing. The effect seems to say that below such minimum altitude the plane descends to the airport under the jurisdiction of the subjacent state. What many difficulties may result? At least a clarification seems essential in view of this case. As we said earlier, we have to get the plane on the ground and it is from the minimum altitude to the ground where the pilot should have more certain and uniform regulations than elsewhere.

Mr. Justice Black wrote a dissenting opinion, concurred in by Mr. Justice Burton, in the above mentioned Causby case, and most properly deplored the majority opinion when he said,

> **"no greater confusion could be brought about in the coming age of our air transportation than that which would result were Courts by Constitutional interpretation to hamper Congress in its efforts to keep the air free."**

Our above comments about the Causby case also apply to some extent to a recent case in Pennsylvania.[26]

It is accordingly the view of the authors that in the public interest and in accordance with the public convenience and necessity, all as detailed in the legislatively declared policy of the Civil Aeronautics Act of 1938, it is essential that the Federal Government take the necessar ysteps to license airports. It is also the view of the authors, as argued above, that it is now beyond the realm of debate that an airport is as much an instrumentality of commerce as any other concept which has been constitutionally placed under the commerce power of the Federal Government, and that all that is needed is appropriate Federal legislation to carry the same into effect.

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[26] ***Gardner v. County of Allegheny***, Pennsylvania Supreme Ct., 4 Avi. 17528 (1955).

INTERNATIONAL AGREEMENTS AND INTERNATIONAL AIR TRANSPORTATION*

THE vast importance to this country of international air transportation requires the committee to consider carefully the part being played by American carriers, the procedures being followed to assure this country's rightful place in world aviation and to determine whether the Congress is adequately exercising its responsibilities in achieving American goals. S. 2647 raises these issues by proposing that more of the international agreements affecting air transportation be subjected to Senate approval before becoming effective. To assess the problem this section will review the importance of international air transportation to American interests, the means by which rights are obtained for American operators and the governmental procedures followed to permit congressional review of these activities.

The importance of maintaining American air-transport services around the world is clear. Our people do business and travel in every free country. Thus a survey of people registered in the leading hotels in Tokyo, Bangkok, Hong Kong, and Calcutta in 1952 reveal that 61 percent were American citizens, only 11.9 percent were British subjects, and the registrations from other countries were less: Japan, 3.3 percent; Philippines, 2.9 percent; China, 2.6 percent, and Scandinavia, 2.2 percent.[1] The Korean war and the war in Indochina gave a new consequence to the events in lands on the other side of the globe. Since it is so important for our people and our products to go abroad, it has become important for the United States to maintain commercial air service around the world.

An indication of American interests in international air transportation was prepared during the war by the CAB, in consultation with the Departments of State, War, and Navy, and was expressed in the air-route pattern announced as essential by the Board in June 1944. That announcement called for the following extensions of American air routes after the war as follows:

In the Atlantic area, the United States, which in 1940 had permission to operate to Portugal, to France, to England and Ireland, in 1944 wanted routes to Iceland, Norway, Sweden, Finland, Russia, Germany, Czechoslovakia, Austria, Switzerland, Italy, Spain, Greece, Turkey, Iraq, Iran, and India.

In the Pacific in 1948, United States routes extended beyond United

* Section VII of AVIATION STUDY presented by Senator John W. Bricker, Chairman, Interstate and Foreign Commerce, 83rd Congress. Senate Doc. 163, 83rd Cong., 2nd Sess. (released January 11, 1955). Prepared for the United States Senate Committee on Interstate and Foreign Commerce on the basis of hearings held on S. 2647 of the 83rd Cong. (An Omnibus Aviation Bill by Mr. McCarran) under the direction of its Aviation Counsel, Edward C. Sweeney.

[1] Hearings of Senate Committee on Interstate and Foreign Commerce on S. 2647 (an omnibus aviation bill by Senator McCanen), p. 528.

States territory to only one area – Hong Kong-Macao. The 1944 goal required the United States to acquire additional rights to Japan, China, French Indochina, British Malaya, Indonesia, Australia, New Zealand, the Fiji Islands, New Caledonia, and the Canton Islands.

Of all the routes deemed essential in 1944, only those in South America had been relatively well established by that time through negotiations between private operators and the governments in that area.

In Africa, where in 1938 we had no operating rights, the announcement of 1944 declared it essential to have routes to French West Africa, Belgian Congo, South Africa, Egypt, and Tripoli.

Nor is the effort by the United States to maintain a leading position in international transportation a new one. As Senator McCarran pointed out, on page 109 of the hearings:

> Since the middle of the last century, we have been trying to maintain an adequate Merchant Marine. We made a serious mistake many years ago in permitting our Merchant Marine virtually to disintegrate so that by the beginning of the First World War we were pitifully weak on the seas. We have tried strenuously since that time to restore our position, but I do not believe that any one will say we have wholly succeeded * * * It is essential that we maintain our position in world aviation that the policies of our Government be carefully framed so as to accomplish this objective.

An evaluation of the effectiveness of current procedures for obtaining international rights can best be made against the background of American achievements in this field since World War II. During that time the United States obtained route privileges which were deemed essential to the national interest; the traffic rights along those international routes to permit operations on an economical basis, and the operating facilities and technical operating agreement necessary to enable aircraft to fly.

Route Acquisitions

The first important step in the acquisition of the necessary air routes was to obtain permission to pass through the airspace of foreign countries. This was achieved by the International Air Services Transit Agreement whereby the subscribing nations agreed to open their airspace to permit (1) foreign aircraft to fly through and (2) foreign aircraft to land for refueling and other technical reasons. This agreement, known as the two freedoms agreement, was signed at the Chicago Conference in 1944 and has been ratified or adhered to by 41 countries; including every major country with vast land space over which aircraft must pass except Russia, China, and Brazil.

The second step was the negotiation of bilateral air-transport agreements with approximately 45 countries and the adoption of more than 20 amendatory actions to those bilaterals between the years 1944 and 1954, permitting the United States to engage in commercial carriage. By these steps, the United States obtained all those routes it had set

as goals for itself in 1944 except routes to Russia, China, and the other Iron Curtain countries.

Acquisition of Traffic Rights to Permit Economical Operations

If the operations were to be economic, the traffic rights must be free from such economic restrictions as limitations on the number of schedules, route monopolies, or the pooling of traffic. The Board, in its testimony at page 684 of the hearings, described these aims:

> **The United States Government was extremely desirous that any agreement so negotiated allow the greatest latitude of action and managerial freedom for our flag carriers so as to promote the greatest development of the service in accordance with the policy declaration of the Civil Aeronautics Act.**

These notions ran counter to the concepts of route monopoly and restricted competition which were followed abroad.

> **As this committee well knows, the principle of competition is not so strongly endorsed abroad as it is in the United States. On the contrary, the nationalized carrier — the chosen instrument — the route monopoly — these are almost the invariable rule. Competition between public carriers of the same type is there regarded as detrimental to the public interest and indeed competition between different transport media is frowned upon. These factors produced a desire in many foreign nations to spell out the details of the operation in advance and strictly limit them in order to permit their own national carrier or carriers to compete on equal terms with any American enterprise.[2]**

Thus, even in the agreements between the United States and Great Britain and France before the war, the schedules had been limited to 2 a week and 4 a week respectively. Another economic restriction included pooling arrangements whereby the traffic revenues were divided evenly between two countries regardless of which airline carried the traffic. In the bilateral transport agreements entered with 45 countries since the war, the United States has the right to pick up and discharge intermediate schedules subject only to general limitations on capacity which recognize the needs of the long-haul operator as well as those of the regional carrier.

Acquisition of Technical Facilities and Standard Operating Procedures Around the World

In addition to route and traffic rights there remained the technical requirements for physical equipment and rules governing operations. The physical equipment had to be obtained and installed at specified points; rules of the road and operating procedures had to be agreed to; and in many of the actions under the above two requirements, it was essential that there be agreement on standards. Furthermore, qualifications of personnel had to be agreed to.

These goals also were realized due in large part to the International

[2] Hearing on S. 2647, op. cit., p. 685.

Civil Aviation Organization. The Chicago Convention, a treaty ratified by the United States Senate in August 1946, established ICAO and provided that the states ratifying or adhering to that convention undertake to collaborate in securing the highest practical degree of uniformity and regulations, standards, procedures, and organizations, in all matters in which such uniformity will facilitate and improve air navigation.[3]

When ICAO came into existence, its immediate concern was the drafting of international standards and recommended practices. Divisional meetings, held in Montreal and elsewhere, were attended by technicians from member states and international organizations, and drew up recommendations for standards in each of the technical fields. The procedure originally laid down, and still maintained for the adoption of annexes and their amendment is as follows:

> Divisional recommendations are considered by the Air Navigation Commission; these recommendations, with changes when found necessary by the Commission, are then sent to member states for comment over a period not less than 3 months, and upon return are reviewed again by the Commission; the revised draft is then brought before the Council for approval or amendment at a special meeting called for this purpose; upon adoption by the Council the completed standards are then sent to member states, which are given a specified length of time — at least 3 months — for disapproval; if a majority of member states has not disapproved all or part of a standard within this specified time, it becomes effective and each contracting state is bound under the terms of the Convention either to put it into practice in accordance with the Council resolution of adoption, or to notify ICAO of any differences between any of its own practices and those established by the international standard.[4]

Within that framework, the United States prepares its position on proposed standards, somewhat as follows: The representatives of United States aviation interests are brought together to consider the problem through the offices of the Air Coordinating Committee, established by executive order, with representation of all departments of Government interested in aviation. A United States position is prepared after such consultation with all interested parties. A delegation representing the American point of view attends the meetings of ICAO and seeks by negotiation to reach an agreement.

Under the auspices of ICAO technical requirements of vast importance were provided. Along international routes some 40,000 facilities were located or services rendered. Rules of the road and operating procedures were adopted which took into account the experience of the United States in commercial flying.

The third class of requirements was the agreement on safety equipment. Standards of aircraft and navigation aids were adopted, which conformed sufficiently to American standards to permit our operators

[3] Art. 37, Convention on International Civil Aviation.
[4] Hearing on S. 2647, op. cit., p. 986.

and manufacturers to compete in international operations and in the world market for aviation products.

Standards for qualifications of airmen and airworthiness of aircraft were adopted which permitted Americans to operate abroad and maintained safety standards adequate to protect our people when foreign operators flew to the United States.

Procedure for Entering Aviation Agreements

The debate as to whether more of the aviation agreements should be entered into by treaty rather than by executive agreements was revived by the provisions in section 802 (b) of S. 2647 which would require three types of aviation agreements to be entered into by treaty.

From the preceding discussion it can be seen that American success in the international field has been achieved by the combined use of two types of international agreements. First, a treaty was used to establish the International Civil Aviation Organization. This organization solved many of the technical problems of international air transport operations. Second, executive agreements were entered into to obtain routes and commercial rights on these routes.

Section 802 (b) of S. 2647 specifies three types of aviation agreements that should be entered into by treaty. These are:

1. An agreement respecting the formation of, or participation of the United States in, an international organization for regulation or control of international aviation or any phase thereof;

2. An agreement generally granting to a foreign government or a foreign airline a right or rights to operate in air transportation or air commerce, other than as a foreign air carrier or a foreign air contractor;

3. An agreement with a foreign government restricting the right of the United States or its nationals to engage in international air-transport operations.

There was no objection by either the executive agencies or the industry to the requirement that an agreement setting up an organization of the type described in paragraph 1 above should be entered into by treaty. It was pointed out by both the Department of State[5] and the carriers that there is not at the present time any international organization which has the power actually to regulate or control international aviation. The International Civil Aviation Organization created by the Convention on International Civil Aviation performs extensive functions largely in the technical field. However, the job of ICAO is to coordinate the regulations and actions of its member governments dealing with civil aviation rather than actually exercising any measure of control. Even though its functions are thus limited, the convention which established this organization was ratified as a treaty.

With respect to the second type of agreement mentioned, the

[5] Hearings on S. 2647, op. cit., p. 808-9.

Department of State said the existing agreements "do not run counter to" this prohibition.[6] The carriers stated that such agreements should properly be regarded as treaties because the agreement referred to is one which generally grants to foreign governments or foreign carriers rights to serve this country. Thus it refers to a multilateral agreement rather than the customary bilateral agreements which have been relied upon to grant traffic rights to foreign carriers. If the United States were to consider a grant of traffic rights to all foreign carriers whose governments are signatory to an open-end multilateral agreement, it was argued by the airline spokesman, this would be a matter which would call for all of the safeguards surrounding the execution of treaties.

As to the third type of agreement there was a greater divergence of views. The third type of agreement referred to was assumed to be the familiar type of bilateral agreement under which United States carriers are given rights to serve a foreign country, usually in return for a grant of similar rights to a foreign carrier to serve the United States. The agreement is described in the bill as one which "restricts the rights of the United States to engage in air-transport operations." Actually, of course, a United States carrier under international law has no right to engage in air-transport serve to a foreign country. Each nation reserves its sovereignty in its own airspace, and special permission must be granted to the foreign carrier to provide service there. Thus our standard bilateral agreement under which such permission is secured could be construed not as an agreement which restricts the right of an air carrier to serve a foreign country, but an agreement which obtains a new right, namely the right for a carrier of the United States to serve the foreign country. These new rights, however, may be subject to certain conditions. For these reasons there was some doubt whether the type of agreement referred to in the bill includes the ordinary bilateral agreement, but in the discussions it was assumed that the intention of section 804 (b) was to require that the customary bilaterals were also to be entered into by treaty.

This seems to be a required interpretation in view of the fact that similar language was used in S. 12, a bill which was reported favorably by the committee, report No. 482, and passed the Senate on December 15, 1950, which was interpreted there to bar the use of executive agreements for the grant of air-transport rights.

Before summarizing the testimony on the issue raised by this third provision in section 802 (b) of S. 2647, it is possible to further limit the area of discussion. There was little criticism of the results thus far achieved in the bilateral negotiations. In fact, the airlines' testimony was that the program by which routes and the commercial rights on those routes were acquired has been successful. The program achieved, to the extent possible in our divided world, the national goals that had been announced by the CAB in 1944.

This leaves the question, however, whether in the future, agree-

[6] Hearings on S. 2647, op. cit., p. 808.

ments of such import should be entered into without ratification by the Senate. Can Congress under the practice of entering bilateral air-transport agreements by executive action alone discharge its responsibility to safeguard the vital American interests involved? To answer that question involves a balancing of the advantages which have accrued from the flexibility of the existing practice with the desirability of increasing congressional review.

The most important advantage of entering these agreements by executive action has been that it was the most expeditious means available for entering the necessary agreements. This was emphasized by the Civil Aeronautics Board (although the Board did not voice any opinion on the merits of the issue as to whether bilateral air-transport agreements should be ratified as treaties or continued as executive agreements) and by the carriers. Since the war the United States has entered bilateral agreements with 45 countries and there have been more than 20 amendatory actions with respect to these. If each agreement and amendment had required the ratification of the Senate a heavy burden would have been imposed on this body by the consideration of those details. The extent of that burden is indicated by the fact that since January 1, 1945, 127 treaties have been considered and ratified by the Senate. If the 65 bilaterals and amendments would have also had to be ratified it would have increased the burden on the Senate arising out of the consideration of treaties by half again. Such consideration by the Senate might well have delayed the negotiation of air-transport rights in the very critical period when it was of the greatest urgency that the United States speedily obtain rights in foreign countries to permit prompt operations in the international airlanes. This need for speeding negotiations was more essential to the United States than for the European states because American aircraft could operate across the Atlantic only if permissions were obtained to land in Canada, Newfoundland, Iceland, and Ireland. Some of our competitors, however, held or could acquire rights by virtue of their control of, or association with the jurisdictions which controlled, the vital land areas. They were under less compulsion. The Board emphasized that only by prompt negotiations did the United States prevent the adoption of restrictive air-transport patterns.

> In the early part of 1946, European nations generally were extremely desirous of reopening their intra-European air routes. Had the United States not been able to come to an immediately effective agreement with the United Kingdom and shortly thereafter with France and Belgium, the restrictionistic philosophy almost surely would have prevailed as between European countries. Once such a pattern had been set, this country would have faced overwhelming odds in attempting to negotiate an agreement suitable to our needs.
>
> What I desire to stress is that the ability to act quickly and decisively in 1946 permitted the United States to establish a pattern which has become almost worldwide and under which our carriers have expanded and prospered.[7]

[7] Hearings on S. 2647, op. cit., p. 685.

On the other hand, there remains the question of whether, in matters of such great importance, that procedure provides for Congress an adequate opportunity to discharge its responsibility to safeguard vital American interests.

On this question it was argued that adequate supervision of these agreements already exists.

Congress has already established a procedure under which the airline route structure of American carriers abroad is carefully supervised by the Civil Aeronautics Board, an agent of Congress. Its actions in this field are subject to review and revision by the President. Foreign routes can be flown only after certificates of convenience and necessity have been issued by that agent. In addition, Congress has maintained a direct check on the character and expansion of our international air-transport system through its control over subsidy appropriations.

With respect to the operation of foreign carriers to the United States, Congress has established a further check upon the entry of such carriers into the United States by requiring that each carrier receive a permit from the Civil Aeronautics Board which, under existing law, may be denied even though there exists a bilateral agreement granting the foreign carrier the right to come to the United States. Such a denial has never taken place, but the established procedures do permit the Board to review, as a matter of first instance, the application of the foreign carrier even though a bilateral agreement has been negotiated. For these reasons, argued the carriers, Congress has made adequate provisions for consideration of the subject matter of the bilateral agreements and it its not necessary for it to go further and require the bilaterals and the amendments to be ratified as treaties.

Another protection for the interests of American citizens in bilateral route negotiations is the consultation between the government agencies negotiating the agreements and those air carriers whose routes will be affected by the rights bargained away. In air-transport agreements, when the United States is seeking permission for our flag carriers to operate into foreign states, the United States is called upon to grant rights in this country to foreign carriers. Rights to operate to the United States gives those foreign carriers access to the richest market in the world. The right to carry United States traffic is comparable to opening the United States market for an industrial product by lowering or removing tariff duties. When such steps are taken, the affected carriers should be given an opportunity to present their views.

Such an opportunity to hear the carriers' views is also a valuable source of information for United States negotiators. The carriers know the foreign markets. They can evaluate the routes offered by foreign states and can keep the United States advised of the operating problems and advantages of specific exchanges.

The consultation here envisaged is in the same spirit as that required in negotiations leading to tariff reductions under the Reciprocal

Trade Act (June 16, 1951, sec. 3 (c), 65 Stat. 73, as extended, Public Law 464, July 1, 1954), which provides:

> **Before any foreign trade agreement is concluded with any foreign government or instrumentality thereof under the provisions of this part, reasonable public notice of the intention to negotiate an agreement with such government or instrumentality shall be given in order that any interested person may have an opportunity to present his views to the President, or to such agency as the President may prescribe; * * ***

The consultation which does and should occur in air-transport negotiations is not as formal as that envisaged in the above statute. It does not, at this time, required legislation. But it does require a continued recognition by the government agencies of the importance of consultation with the interested carriers as an important method of maintaining essential safeguards for American interests. These consultations should be relied upon to the fullest extent feasible.

On the issue of congressional review, the Congress should consider a middle ground between the procedure which is being followed now and that which is proposed in S. 2647. At the present time, none of the executive agreements nor any of the amendments are submitted for review by the Senate. Under the proposal in the bill not only all agreements but also all of the amendments to the agreements would have to be, not only reviewed but also approved by the Senate. This obviously would increase the workload of the Senate enormously and might lead to the imposition of so much detail in some of the minor amendments of the agreements, that the Senate would be impelled to deal only summarily with all of the mass of aviation agreements presented and thereby, in taking on too much, lead to a failure to consider important basic policy.

A proposal which would take a middle ground between these two propositions is one which would require that executive bilateral agreements be filed with the President of the Senate who, in turn, would refer those agreements to the appropriate committee. There are two versions of this proposal. One would require the filing of executive agreements within 30 days after they become effective. The other version would require the filing of such agreements within a specified period before they become effective. The latter is similar to the proposal incorporated in the Atomic Energy Act of 1954, Public Law 707, August 30, 1954. Section 123 of that act provides that no cooperation with any nation shall be undertaken until the agreement has been submitted to the Joint Atomic Energy Committee and 30 days have elapsed. That section reads:

> **SEC. 123. COOPERATION WITH OTHER NATIONS.—No cooperation with any nation or regional defense organization pursuant to sections 54, 57, 64, 82, 103, 104, or 144 shall be undertaken until— * * ***
>
> **c. the proposed agreement for cooperation together with the approval and the determination of the President, has been submitted to the Joint Committee and a period of thirty days has elapsed while**

Congress is in session (in computing such thirty days, there shall be excluded the days on which either House is not in session because of an adjournment of more than three days).

With reference to the aviation agreements discussed here your committee recommends the notice to the Senate version. This middle ground would require bilateral agreements to be filed with the Senate within 30 days after their adoption, and thus would provide the Senate with an additional opportunity to consider international air-transport agreements which is not available under the present procedure and without the disadvantages flowing from the provision in S. 2647. It would permit the executive agencies to continue their flexible and speedy handling of the many air-transport problems which is the advantage of the present procedure and at the same time permit the Senate to review these activities and afford an opportunity to exercise its responsibilities with respect to them.

SURVEY OF EGYPTIAN AVIATION LAW AND POLICY—PART II

By Abdelmoneim Ismail Ahmed

Practice Under Bilateral Agreements

After the ratification of the Chicago Convention, Egypt followed the method of concluding bilateral agreements with foreign countries, for the establishment of scheduled air services between and beyond their respective territories. The Egyptian government set up a standard form to be used in such treaties. It has entered into negotiations with many foreign governments for that purpose, and succeeded in concluding such agreements on the basis of the principles provided in the standard form set up by it.

Current Egyptian practice is to grant the designated airlines of the contracting party with whom a bilateral agreement is concluded an operating permission to operate the specified air services to and/or through Egyptian territory for an unlimited period. As to the airlines of foreign countries, with whom Egypt has not concluded a bilateral agreement or has concluded a bilateral agreement but which is not yet in force, the practice is to grant them a temporary permission for six months, renewable if the case warrants such a renewal. As to non-scheduled air carriers, the conditions of the operation vary to suit individual cases.

In fact, Egypt has always exercised sovereignty over the air to the extent that she wished. These claims have never yet been challenged; nor, has there ever, until now, been any suggestion made that sovereignty was more limited with regard to the space above the land than it is with regard to the land itself. If this is not the case, i.e. that air space is not within the jurisdiction of the sovereignty over the land, surely there would have been some protest, or at least some doubt expressed as to the validity of these assertions of sovereignty. But in the whole history of civil aviation in Egypt, there has never been any question raised in any single case, nor has any doubt ever been suggested as to the jurisdiction of Egypt over the air until the present time.

As to foreign military aircraft, they were not permitted to operate to or through Egyptian territory, except by a prior permission. Necessity for this permission was waived if an agreement existed between Egypt and the country of origin of the aircraft.

Some debate on the status of the foreign armed forces in Egypt had occurred. Certain writers,[9] expressed doubt as to the extent and

[9] Legoff, M. Le statut aérien du canal de Suez d'après le traité anglo-égyptien du 25 août 1936. Revue générale de droit internationale public. 1939: 142—58, and David Morgan Hughes Airspace Sovereignty over Certain International Waterways, *Jrn.* of Air Law & Com. Vol. 19 Spring, 1952, No. 2, p. 144-151.

nature of Egyptian sovereignty over the air space above the Suez Canal area. As this question is no longer of any legal practical importance, it will not be the subject of study of this survey. It would be suffice to say that the status of friendly forces in Egypt and in Great Britain has been the subject of study by many eminent writers.[10] A careful analysis of the forementioned studies, putting in mind the principles of air space sovereignty mentioned earlier in this chapter and being mindful of the fact that the Suez Canal area is an integral part of the Egyptian territory, one could say that there was no need of the doubt expressed as to the full and exclusive sovereignty of Egypt over the Suez Canal. A treaty must be construed as a whole, so that no article of the treaty is to be taken substantive or standing alone and single from the rest.

Establishment of Aviation Facilities

In Egypt, the Law of 1920 specifies that the establishment of aerodromes is a monopoly of the government. This law, however, provided indirectly that any person may by prior authorization from the government establish an aerodrome. Inasmuch as there is no legal provision refusing this right to foreigners, it may be deduced that the latter either as individuals or corporations may open and maintain aerodromes in Egypt.[11] Nonetheless, the exercise of this right is controlled by the State. This policy has been widely considered as anomalous and erroneous. It is surprising that the legislators who are usually so strict on the question of the Egyptian nationality of proprietors of Egyptian aircraft should not have exacted a similar requirement with regards to the ownership of aerodromes situated in Egypt. There is a certain latent danger in the fact that a great number of aerodromes in Egypt be owned and exploited by foreigners. It is proposed that the law be amended on this point to refuse any authorization to any foreigner to establish or exploit any aerodrome in the Nile Valley.

It should be noted that in the last few years there has been a general tendency toward increased State intervention and control. That is the case in Egypt, the U.K., France and Italy. However, the experience of Canada and the U.S.A. has shown that aerodromes have developed rapidly, aided by private initiative. But, private initiative may lead to a certain dispersion of effort. Further, the problem has evolved. Private enterprise or particular group interests are no longer the sole factors. The establishment of an adequate infrastructure is of general public interest. Coordination of aids to navigation and communication is necessary for the safety of air transport. Finally, the cost of estab-

[10] Jurisdiction over members of Allied Forces in Egypt, by J. Y. Brinton, American Journal of International Law, Vol. 38, 1944, p. 375. The Legal Aspect of the American Forces in Great Britain by A. L. Goodhart, American Bar Association Journal, Vol. 28, p. 762. Jurisdiction over Friendly Foreign Armed Forces. American Journal of International Law Vol. 36, p. 539. 1942 by A. King. Further Developments concerning Jurisdiction over Friendly Foreign Armed Forces. American Journal of International Law, Vol. 40, 1946, p. 257 by A. King. The Egyptian Mixed Courts and Foreign Armed Forces, American Journal of International Law, Vol. 40, 1946, p. 737 by J. Y. Brinton.

[11] Article 1 of the law No. 19 of 1920.

lishing an infrastructure has grown considerably and has reached, at least in the case of the larger commercial airports a figure which exceeds private resources. For this reason, the establishment of aerodromes and infrastructures offering the facilities required by modern aerial navigation is coming to be considered as a public service which should be undertaken by the State.

However, it is not appropriate to enunciate any general rule here. The solution to the problem is largely dictated by convenience. In my opinion, it seems that the Egyptian government may be charged with the establishment of infrastructures required by international traffic as well as those which are of national interest.

In Egypt, the government establishes all aerodromes situated on regular air routes. It also organizes and sees to the maintenance of beacons, communication signals and meteorological services. The establishment of public aerodromes is the financial concern of the State alone. The authority concerned with the establishment is the Civil Aviation Department. The planning is the concern of the Civil Aviation Supreme Board.

Condemnation of Land for Aerodromes

There is no single article, in the Egyptian positive law of aviation empowering the civil aviation authorities to acquire land either compulsorily or by agreement, for the purpose of establishing aerodromes, including roads, approaches, buildings, apparatus and equipment. In the absence of such rules, we should resort to the rules of common law —in this case to the law of acquisition of land for public interest. The expression "land" is to include land covered with water and any right in and over land. The State or its public agencies (Civil Aviation Department) in acquiring land for an airport, does not act differently than when it engages in other public projects such as establishing tunnels, docks, bridges or highways.

The acquisition of land Act governs the procedure for assessing compensation where land is acquired compulsorily. This Act establishes a panel of official arbitrators who have special knowledge of the evaluation of land. Compensation is payable to any person who suffers any direct injury or loss owing to condemnation of his property. It is recommended that the new law should not provide any ruling in this connection, as the general rules would serve our purpose.

The preceding rules are not to be applied to private aerodromes. The Civil Aviation Department, before permitting any private person to establish any aerodrome, must be sure that the land proposed for such establishment is enough to fulfill the technical requirements.

Protecting the Vicinity of the Aerodrome

The landing area for aircraft is more than just the ground space required for the runways, loading and unloading aprons and for storage and servicing facilities.

The air space surrounding all landing areas is of so much importance that the approaches to the ground space should be considered a part of the landing areas. In order to protect the approaches, tall buildings, trees, and communication and power lines must not become a hazard. The air space as well as the ground space must be protected, and some control over neighbouring property is, therefore, necessary.

According to the officers of the National Institute of Municipal Law,[12] there are a number of means of protecting approaches:

(a) Voluntary action by the owners of installations which constitute hazards. (b) Purchase of all land near the airport and razing of hazards located thereon. (c) Purchase of air space rights over all land near the airport. (d) Acquisition of air space rights over land near airports by use of the power of eminent domain in order to raze present and prevent future hazards. (e) Police power: condemnation of hazards to use of airports.

The proposal that these obstacles be overcome by increasing the size of the airport and thus increasing the distance from the point of landing or take-off in which there are no structures to jeopardize the safety of operations, is obviously impracticable. If such purchase is impossible, the remaining alternatives are regulation by zoning and acquisition by purchase, lease, or condemnation of the rights on air space above the surrounding property.

Zoning: Under the police power, the main protection of airports from abutting neighbouring land is in the regulation of these areas by zoning. There can be no such regulation solely in the interest of the port, rather, such regulation must be for the protection of the interests of the public. There are numerous illustrations, in the law books, of ordinances where prohibitions against the maintenance of public garages, laundries, moving picture theatres, and the like within specified distance of schools and hospitals have been upheld as proper measures to protect the public's interests.

Aircraft operating upon regular schedules in the transportation of goods and passengers, generally carrying heavy loads and flying in all kinds of weather, must be assured at all times of safe avenues of approach to the established terminals and intermediate landing fields. The adoption of ordinances to eliminate undue dangers to such traffic thereby becomes a measure directly in the aid of the public welfare.

Police power cannot be exercised over private airports. The Civil Aviation Authorities must be sure that applicants' for private airport licenses are able to purchase the adjacent land required for the protection of such an airport. It is interesting to mention here that prohibiting any person from doing with his property what previously he was free to do, is always the taking of a right in it. Compensation must be paid to such a person. The means chosen to protect the vicinity of

[12] Commercial Air Transportation by John H. Frederick, Revised Edition 1946, p. 116 (footnote 9), quoted from Airports and Airplanes and the Legal Problems They Create for Cities (Washington, D.C., 1939).

aerodromes, by the Egyptian legislators, is zoning Law No. 27 enacted in 1941, empowering the Minister of War and Marine to issue orders to establish around each aerodrome a zone not exceeding four hundred meters in width. Once this zone is established, nobody is authorized to build anything higher than 1/20 of its distance from the aerodrome.

Role of ICAO in the Establishment of Aerodromes

The Chicago Convention contains provisions[13] of a kind not included in any earlier convention, designed to secure that airports and air navigation facilities of the standards laid down under the Convention, shall eventually be available for International Air Traffic in the territories of all contracting States. The obligations undertaken by the contracting States are, however, subject to limitations and safeguards which make it impossible for a State to be compelled to take action against its will.[14] The obligation to provide airports and facilities is stated in article 28 of the Convention.[15]

Management and Exploitation of Aerodromes

Each State has its own system. Here, by way of example, is the Egyptian system. Private aerodromes may be excluded: their management depends on their proprietors. State aerodromes may be managed by the State or by a concessionaire. The fact is that, till the present time, the Civil Aviation Department manages and exploits all public aerodromes.

Under exceptional circumstances, an aerodrome may be managed by a concessionaire. It is my belief that a concession is advantageous neither for the State nor for the concessionaire. It has become increasingly clear that an airport can seldom be expected to pay an adequate return on invested capital, so that it offers little attraction as a business project. Management or exploitation of an aerodrome is generally unprofitable because the different fees levied on aircraft, do not cover usually imposed operating management expenses nor the expenses of upkeep and improvement. One way out, would be to raise fees, but such a raise would be harmful to aviation. It would undermine the development of commercial aviation which would then be obliged to shift the burden to the passengers and shippers of cargo. Some one would say that the State should give some subsidies, but in this case the concessionaire is not likely to make any effort to improve the enterprise.

It is evident that an airport is a public utility deserving of support, even though a considerable net outlay may be entailed in keeping it up. It is submitted that it is highly desirable that the Egyptian government retain management of all public aerodromes and not allot them to concessionaires.

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[13] Cf. Chapter XV of the Chicago Convention on Airports.

[14] *Ibid.*

[15] For more details see Shawcross, C. N. and Beaumont, K. B., Air Law, 2nd edition, London 1951, p. 504, 505, and 506.

Whatever the form of management, whether by the State or by a concessionaire, two sets of rules should be considered: (a) The first concern fees which must be equal for foreign and domestic aircraft engaged in international flight. The Chicago Convention clarifies these rules in article 15. (b) The second set of rules concern the position of the manager of aerodromes. It is he who exercises police power. This power is clearly defined in the existing rules.[16] He is empowered to inspect the documents of the aircraft and to oppose its departure if the case warrants.

From the standpoint of the safety of aerial navigation, the aerodrome manager has wide discretionary powers. The Egyptian ruling limits the freedom of take off to the case where the manager is certain that the pilot has familiarized himself with the meteorological data for the trip. It is submitted that the law should clearly specify that the manager's liability ceases once he has provided the pilot with adequate meteorological information.

Moreover, the ruling provides that the manager has the right to stop all take-offs which he deems dangerous either because of ground conditions or exceptional atmospheric conditions.[17] He may do this but he is in no way obliged.

The National Airport Plan: Egypt would require at least a total of three hundred airports to serve adequately the transport and private flying which reasonably could be expected to develop within the near future. In developing any national airport program the national natural division of labour is for the central government to undertake the over-all planning since there must be a national pattern.

The provinces or the municipalities are, however, best fitted to handle the local details, and financing should be a joint enterprise, on the basis of the central government aid to public utilities: the highway system, for example. One formula for the distribution of central funds as they become available for provincial use involves taking four factors into account: (1) The area of each province. (2) The population of each province. (3) The number of registered aircraft in each province. (4) The existing number of airports in each province. Under such a plan, each province would match a specified percentage of its quota of central funds with its own money.

Seaplanes or Amphibian Bases: Not only the coasts of Egypt, but the lakes and the River Nile as well, provide many natural landing areas for seaplanes and amphibians. The opportunities for seaplane and amphibian operation in the interior of the country should be increased in the near future by the formation of new water bases. The existence of these water bases has ever been held to be one solution to the problem of airport shortage with which the nation of the Valley of the Nile is faced, particularly for the private flyer. The briefest

[16] E.g. Article 8 of the Law No. 27 of 1941.
[17] Article 12 of the Decree issued on the 23rd of May 1935.

study of maps or charts, is enough to show that there are hundreds of possible sites well prepared by nature in this country.

A widespread use of seaplanes and amphibians is as dependent upon the supply of adequate seaplane bases as the use of land-based aircraft is dependent upon airports. Commercial operations and private pilots could utilise lakes and rivers which often are more convenient to downtown city areas than present airports.

Airport Adequacy: The airport system of Egypt may be judged as to its adequacy on several bases. These are: (1) Airport location in relation to the cities served. (2) Size of airports and runway distribution thereon. (3) Airport equipment and buildings. (4) Extent of protection of landing areas exclusive of the airport itself. (5) Services available for the traveling public.

The record of performance of air transport in Egypt has been admirable, and its growth both in volume of operation and in public acceptance and popularity has been rapid, but it would give a better, safer and more reliable service if the general standards of quality of the airports used by the commercial airlines as regular scheduled stopping places or as occasional alternatives could be materially improved.[18]

Airport Income: All airports in Egypt are not paying their way or breaking even on the mere interest and sinking fund charges on the bonded indebtedness involved in their construction charged against operations. Airport income includes all revenue received from both aeronautical and non-aeronautical activities. It includes such items as commissions, rentals from restaurants, garages, swimming pools, hotels and landing fees etc. The State should consider the airport in the light of a country attraction, bringing business to it, yielding an indirect and intangible return, and prefer not to take the chance of making their field less attractive to users by charging for example, more than nominal fees for its use and service. An attempt should be made to make an airport pay for itself. Whether or not an aerodrome can be made to pay, depends upon considerations which are subject to variations.

Recommendations

In the light of the material presented in this chapter, and of the other information that has been secured during the preparatory work for this survey, we make the following recommendations:

(1) Development and maintenance of an adequate system of airports and seaplane bases should be recognized in principle as a matter of national concern.

[18] This subject is under careful study of the C.A.D. and the C.A.B. in Egypt.

(2) Such a system should be regarded, under certain conditions, as a proper object of government expenditure.

(3) In passing upon applications for central government expenditure on airport development, establishment or improvement, the highest preference should be given to airports which are essential to the maintenance of safe and efficient operation of air transportation along the major trade routes of the nation; and to those rendering special service to the national defense.

(4) At such times as the national policy includes the making of grants to local units of government for public-works purposes, a proportion of the funds involved should be allocated to airport purposes. Such purposes should be given preference as rendering an important service to the localities concerned, and at the same time being of particular importance to the nation's commerce and defense.

(5) The Director of Civil Aviation Department may for the purposes of civil aviation establish and maintain aerodromes and provide and maintain in connection therewith roads, approaches, apparatus, equipment and buildings and other accommodations.

(6) Any local authority may, with the consent of the Director of Civil Aviation and subject to such conditions as he may impose, establish and maintain aerodromes and provide and maintain in connection therewith roads, approaches, apparatus, equipment and buildings and other accommodations.

(7) A place in Egypt other than a government aerodrome shall not be used as a place of landing and departure by any aircraft carrying passengers or cargo unless it has been licensed for the purpose, or save in accordance with the conditions, if any, of such license.

(8) A license for an aerodrome for private use; that is to say, for use by the licensee and by individuals specifically authorized by the licensee, shall not be granted to any person or corporation other than 1) an Egyptian subject, or 2) a company or corporation registered and having its principal place of business in Egypt.

(9) An aerodrome may be licensed for all type of aircraft or for certain specified types or classes of aircraft and the license may specify the conditions on which the aerodrome may be used.

(10) Every aerodrome which is open to public use by aircraft registered in Egypt upon payment of charges shall to the same extent and upon the same conditions be open to use by aircraft possessing the nationality of a contracting state.

(11) The Director of Civil Aviation shall for purposes of civil aviation and any purposes connected with the discharge of his functions have the power to acquire land or any right in or over land by agreement or compulsorily.

(12) The Director of Civil Aviation may by order provide for the creation in his favour of easement over land or of other rights in or in

relation to land, including rights to carry out and maintain works on any land and to install and maintain structures and apparatus on, under, over or across any land if he is satisfied that it is necessary to do so in order to secure the safe use for civil aviation purposes of any land which is vested in him.

(13) The Director of Civil Aviation may by order impose such prohibitions or restrictions on the use of any aerodrome as he thinks expedient for the purpose of securing that aircraft may arrive and depart with safety at any aerodrome under his control.

(14) The Director of Civil Aviation shall appoint for each aerodrome vested in him an officer who shall be responsible to the Director for all services provided on the aerodrome on behalf of the Director, including signalling services, flying control services and services connected with the execution of works.

INTERNATIONAL REVIEW*

INTERNATIONAL CIVIL AVIATON ORGANIZATION (ICAO) 10TH ANNIVERSARY

IN DECEMBER 7, 1944, the Convention on International Civil Aviation was signed, after a conference in Chicago which was attended by representatives of more than fifty nations. To honor its 10th Anniversary the following statement was made by Dr. Edward Warner, President of the Council of ICAO:

"It is ten years today since the world's Governments signed the Convention on International Civil Aviation at Chicago. In those ten years the Organization that the Convention created has been busy in standardizing air navigation practices for the major part of the world; in planning the radio and other equipment to be installed, and the services to be rendered along the world's airways, and listing the specific provisions to be made at each point on the airway map; in encouraging Governments to reduce the formalities and paper work of international flight to a minimum; and in other activities leading to agreements among Governments or recommendations by the ICAO Council to Governments, some of them along lines foreseen at Chicago and others conceived since that time.

"All this specific accomplishment is important, and indeed much of it has been indispensable to the development of international air transport. Quite as important as the acts recorded in specific resolutions and plans, however, it seems to me, is the atmosphere in which the work to reach all these conclusions has been done. Quite as important is the very fact that the representatives of many nations have developed the habit of coming together in a common quest for measures that all may take for the common advantage. When Governments are in the habit of cooperating, they find more and more matters on which they can cooperate to advantage. When the representatives of twenty or thirty Governments come together to discuss the needs of civil aviation, twenty or thirty national views merge on many points into one; and even though differences of opinion on the best solutions for some of the problems may still exist, between nations and within nations, there is unity on the primary objective of enabling aircraft to move easily and surely from place to place on the errands of commerce. If the brightest spot in ICAO's history had to be stated in a phrase, it would be that the habit of the nations taking council together to reach agreement upon what specific actions will best advance the common objective has been thoroughly established."

AIR TRANSPORT ACTIVITY

First action arising out of the Strasbourg Conference on European Air Transport

Having agreed, pursuant to the last section of Recommendation No. 28 of the Strasbourg Conference, to convene the first meeting of the proposed European Civil Aviation Conference, the Council of ICAO has decided in consultation with European States that the meeting shall open on the 29th of November 1955. A provisional agenda has been approved and circulated to the states due to take part in the Conference.

The *PROVISIONAL AGENDA* includes such subjects as the *Establish-*

* Compiled by J. G. Gazdik in co-operation with G. F. FitzGerald and Mr. A. M. Lester.

ment and Organization of the European Civil Aviation Conference; the *Exchange of Traffic Rights;* the *Interchange of Aircraft;* and *Helicopter and Other Short-Stage Transport.*

Also on the agenda is an Examination of Policy with respect to European fares and freight rates, with a view to focusing attention on any anomalies in the present European rate structure. *Facilitation and Related Questions* will be considered as will *Air Navigation Facilities.*

The ICAO Council has also agreed to initiate work on the preparation of draft multilateral agreements for scheduled and non-scheduled air services pursuant to Recommendations Nos. 2 and 6 of the 1954 Strasbourg Conference. Work on these problems for the European region is regarded as providing for the present the best method of seeking solutions for the world as a whole.

After careful consideration of Recommendation No. 16 of the 1954 Strasbourg Conference concerning the possible elimination or simplification of the journey log book, passenger list and cargo manifests for European use, the Council adopted the following resolution:

"WHEREAS the Strasbourg Conference on the Coordination of Air Transport in Europe recommended that States invited to participate in the Conference should in future refrain from requiring the presentation of log-books or of separate passenger manifests in connection with the entry and departure of aircraft engaged in transport between European States; and

WHEREAS there is nothing in the Convention or in any of its Annexes to prevent compliance with these recommendations; but

WHEREAS Article 29 of the Convention requires that all aircraft engaged in international air navigation carry certain documents, including a passenger list, cargo manifest, and journey log-book; and

WHEREAS even if States are willing to refrain from requiring the presentation of these documents for examination, as recommended by the Strasbourg Conference, the operators of aircraft would therefore still be obligated by the Convention to prepare and carry the documents; and

WHEREAS the Strasbourg Conference recommended that ICAO examine the question of amending Article 29 to delete such specific requirements for documents to be carried by every aircraft engaged in international air navigation as might in future unnecessarily handicap the facilitation of air transport or burden its operations; and

WHEREAS the Strasbourg Conference also recommended that ICAO consider the possibility that the requirements of Article 29 might be satisfied by the use of documents that also serve other purposes on board the aircraft.

THE COUNCIL RESOLVES:

(1) To examine the question of amending Article 29, and, in the event that preliminary study indicates a possibility that such an amendment would be practicable and desirable, to invite the views of all Contracting States on the desirability of proceeding with an amendment and on the form that it should take;

(2) That, as an immediate measure, the States invited to take part in the Strasbourg Conference may properly consider the simplification of the forms of journey log-book, passenger list, and cargo manifest, required to be carried by their aircraft in accordance with Article 29;

(3) That among the simplification of form that those States might consider approving for this documentation are:

(a) The use, as a "list of [passengers'] names and places of embarkation and destination," of a complete set of ticket coupons for the passengers on board;

(b) The use, as a "manifest and detailed declarations of the cargo," of a complete set of copies of the air waybills for the cargo carried;

(c) The use, as a "journey log-book," of a "general declaration"

as specified in Annex 9, containing the information specified in Article 34 of the Convention.

(4) That the use of such simplified forms of documentation in international air navigation by the States referred to in (2) must be dependent upon the willingness of the States entered by the aircraft either (a) to forego the presentation of the documents as recommended by the Strasbourg Conference to its participants; or, (b) if continuing to require the presentation of any of these documents for purposes of entry and clearance, to accept the simplified forms as adequate for their purposes;

(5) That this resolution be circulated to all Contracting States for their information."

The Strasbourg Conference directed a number of recommendations to the governments of participating States suggesting for example that they should encourage co-operation between European airlines, should liberalize their interpretation of capacity clauses in bilateral agreements, etc. All the states that participated in the Strasbourg Conference have not as yet informed ICAO of their reaction to these recommendations, but among those states that have sent in reports (about two-thirds of those invited to the Conference) the majority indicate that they are able to accept the main Strasbourg proposals at least in principle. In the case of the Recommendation No. 5, that certain specified categories of non-scheduled air service should be given freedom of international operation within Europe, nine States have indicated acceptance of the recommendation and so far no state has rejected it.

International non-scheduled air services

The Council has completed a first review of the definition of a scheduled international air service which it adopted in March 1952. Contracting States of ICAO were canvassed as to the acceptability of the definition now that they have had time to apply it in practice and some states suggested modifications or indicated that they had difficulties with particular parts of the definition. A strong move developed in the Air Transport Committee to insert in the definition the concept that a scheduled international air service was "normally operated irrespective of payload," but the proposal failed by a small margin to achieve majority support in either Committee or Council. Special attention was given to the complaint that the phrase "so as to serve traffic between the same two or more points" was not clear and that the use of the definition of "international" taken from Article 96 of the Chicago Convention was unsatisfactory, but the Air Transport Committee could find no better solutions than those formerly adopted and the Council has therefore decided that its definition of a scheduled international air service shall for the present remain unaltered.

Problems of charging for route navigation facilities

The Air Transport Committee has completed a first reading of a draft report on the problems of charging for route air navigation facilities. It hopes to finalize this report in the autumn of 1955 for submission to the Council.

Passenger stop-overs in international transport

As the result of a request from the Government of Lebanon, the Air Transport Committee and Council have considered the problem raised by

passenger stop-overs in international air transport. It was decided that states would not wish the Council to make specific recommendations as to how each Government should treat stop-overs since these were questions of interpretation of the terms of bilateral agreements. A quantity of information concerning states' practices in this matter had, however, been collected by the secretariat and it was decided that this information should be analyzed and circulated to all contracting States for their information.

LEGAL SUB-COMMITTEE

The Legal Sub-Committee on the Negotiability of Air Waybill is meeting in Madrid beginning April 12th, 1955. In conjunction with this meeting, a small Sub-Committee will meet also in Madrid in order to see if the revision of the Warsaw Convention should be made by way of a Protocol of amendment or the drafting of an entirely new International Agreement. In this connection it should be noted that an International Conference will be held at the Hague in September, 1955, to revise the Convention for the Unification of Certain Rules Relating to International Carriage by Air; Warsaw 1929.

TECHNICAL ACTIVITY

International Airworthiness Standards

In June, 1954, the Council considered a report from the ICAO Air Navigation Commission which indicated that efforts to develop a set of complete, comprehensive and detailed international airworthiness specifications for the type certification and operation of aircraft were impracticable of attainment; the report stated that the primary objective of international airworthiness standards should be to define, for application by the competent national authorities, the minimum international basis for the recognition by states of certificates of airworthiness for the purpose of the flight of foreign aircraft into and over their territories, thereby achieving, among other things, protection of other aircraft, third persons and property. The new airworthiness code should be less detailed than existing international airworthiness and corresponding aircraft operations standards.

The Council authorized the Air Navigation Commission to convene a panel of experts to prepare the initial draft for the development of new standards, on the basis of the principles listed above, and requested the Commission to report back when this has been done. The first meeting of this panel was convened in Montreal during the latter part of November, 1954.

The Panel has recommended that the concept of certification in an ICAO Category be dropped. In lieu thereof it is proposed that ICAO adopt a set of "broad," "general" or "objective" airworthiness requirements, and that all aircraft engaged in international operation be certificated to comprehensive and detailed national codes which meet all the broad international requirements. Inasmuch as the broad international requirements do not of themselves specify any practical level of airworthiness, it is proposed that in order to establish some degree of uniformity in the level of airworthiness of the various national codes, "Acceptable Means of Compliance" (AMCs) be developed to cover certain aspects of airworthiness in connection with which a more specific indication of the intended level of airworthiness is required than that contained in the corresponding standard. An AMC is, therefore, an example of the level of airworthiness intended by its corresponding Standard. There is no obligation to observe the letter of the AMC;

there is, however, an obligation to observe the level of airworthiness which it portrays.

At this first meeting the ICAO Airworthiness Panel prepared a first draft of the proposed Standards and agreed that AMCs should be developed at its next meeting to cover (a) performance, (b) structures, (c) engines and propellers. Inasmuch as agreement could not be reached on any one form that the AMC dealing with aircraft performance should take, it was decided that two parallel AMCs should be developed on this subject — one based on the SCP "statistical" approach and the other based on the "empirical" approach as contained in the present Annexes.

The status of this ICAO Airworthiness Panel is that of a working group of the Air Navigation Commission. At the present time it has only half completed its job and has officially presented no recommended Standards or Acceptable Means of Compliance to the Air Navigation Commission. Following its next meeting, to be held on June 14th, 1955, the findings of the Panel will be processed through the Air Navigation Commission and given wide distribution as a proposed re-draft of the present Annexes for consideration at a subsequent Air Navigation Conference.

Fourth Session of the Meteorology Division

The Fourth Session of the Meteorology Division of the International Civil Aviation Organization (ICAO) held simultaneous meetings with the Commission for Aeronautical Meteorology of the World Meteorological Organization (WMO) at ICAO's Montreal Headquarters from June 15th-July 14th, 1954.

Twenty-five ICAO Contracting States and four International Organizations were represented. The USSR, a member of WMO, had sent observers to the Meeting. The Division succeeded in preparing a comprehensive set of standards and recommended practices covering the needs of International Air Navigation for Meteorological Services. These provisions are intended to be embodied in a new annex to the Chicago Convention which is the charter of ICAO.

The discovery of weather in the higher layers of atmosphere has caused airline operators to realize that the present meteorological information of importance for their operations is inadequate. With modern airliners now flying on scheduled routes through the upper atmosphere, a better knowledge of weather conditions there is indispensable. The ICAO Division having assessed the progress to date fully explored the potentialities of modern observation techniques in order to fill the gap that exists today in the knowledge of weather conditions near the tropopauze and in the stratosphere.

The Meeting also dealt with many other items bearing on the reliability and comfort of international air transportation.

Third North Atlantic Regional Air Navigation Meeting

The ICAO Third North Atlantic Regional Air Navigation Meeting held its sessions in Montreal in October, 1954. The Meeting revised completely the regional air navigation plan which lists the air traffic control and communications networks, the aerodromes, and the other facilities and services required to make air transport safe over the North Atlantic. The revision was necessary because of recent advances in aviation technology and because of the potential introduction of trans-polar flying and of turbo-jet-and-turbo-propeller-engined aircraft during the next few years.

Traffic in the region has increased greatly, and this year total aircraft crossings of the Atlantic are likely to exceed 60,000, with a fifty per cent increase expected in the next five years. The present long-range air navigation aids, while allowing aircraft to navigate safely, do not permit of extremely accurate position fixes at all times, and therefore a wide separation between aircraft in flight at the same altitude levels is required; this wide separation has inevitably resulted in delays for aircraft ready to take off. To improve the long-range navigation system, the meeting recommended that Consol radio beacons be installed in Iceland, Southern Greenland, Azores, Eastern Newfoundland, Labrador, and at Nantucket Island and Atlantic City in the United States. With the existing Consol stations in Europe, this will provide a complete long-range navigation chain for the North Atlantic and make it possible for aircraft in flight to report their positions back to traffic control with accuracy and regularity. Until these new facilities are provided, the meeting recommended that in general a minimum separation of thirty minutes' flying time should be maintained by two aircraft on the same or on converging tracks, and a minimum lateral separation between aircraft on parallel tracks of 120 nautical miles.

INTERNATIONAL AIR TRANSPORT ASSOCIATION (IATA)

TRAFFIC CONFERENCES — VENICE, SEPTEMBER, 1954

The 1954 sessions of the International Air Transport Association Traffic Conferences at Venice have approved almost 500 unanimous resolutions which are subject to government approval. The agreements reached on October 15 cover virtually all phases of fares, rates and conditions of carriage on the international services of the 71 IATA airlines during the year beginning April 1, 1955.

The Conferences have agreed on worldwide passenger fares tariffs which will maintain present price levels in most areas. There were a number of upward fares adjustments in a few regions, notably in Europe, to meet rising costs, as well as some actual reductions in fares.

A new feature of the 1955-56 tariffs is the inclusion of fares for service over the North Pole between the West Coast of the United States and Copenhagen.

A number of changes have been made in the rules for tourist services to maintain a price differential about 20 per cent below first class and to adjust the physical conditions and permissible amenities of tourist service to the past year's experience in their operation.

The line on fares and rates despite the rising prices of the ingredients which go into airline service has by and large held up. Where the airlines had to give way, adjustments have been kept to a minimum — increases seldom exceeded 7 per cent and average a good deal less, while agreed reductions will run as much as 20 per cent below fares presently charged on the routes concerned.

The worldwide fare structure has been made more flexible and responsive to the needs of particular regions by the expansion of special "B" or excursion fares, lower than tourist, for service in older and non-pressurized aircraft.

In short, the public will get still more air transport for its money, in terms of its real purchasing power, next year than ever before. Any reductions in the net incomes of the Airlines as a result of these decisions will probably be compensated by expanding service, by more aggressive sales and development, and by plugging up the revenue leaks in commercial practices and procedures.

Decisions taken on passenger fares in various regions of the world, were as follows:

Western Hemisphere — Maintenance of present levels on routes within the Americas, with a few minor and local adjustments. Some reductions of 7 to 8 per cent in tourist fares in Central America between Mexico City and Panama, and some new excursion fares within the Caribbean area.

Intra-Europe — Adjustments of many individual fares within Europe, involving increases of 2.5 to 5 per cent, in order to meet rising operating costs and iron out anomalies in the tariffs structure which have come to light during the first full year of tourist services in that area. Some reductions in fares into and out of Yugoslavia; and a small decrease in special tourist fares between the United Kingdom and Scandinavia.

A new European Creative Fares Board was created to bring greater order into the setting up of special fares for off-peak, night services, and the like, and to make certain that they will really develop new traffic and will not dilute normal revenues.

Europe, Middle East and Africa — Fares will remain generally the same.

except for increases of 5 per cent or less between Europe and Dakar; and between Europe and Madagascar, Reunion and Mauritius, applicable mainly to first class services. Some reductions in fares on routes between the Eastern Mediterranean and points within the Middle East.

Far East — A new class of round-trip excursion fares running about 12.5 per cent below tourist levels has been agreed for services within the Far East on equipment inferior to four engined, pressurized aircraft. Otherwise fares within the Far East and Pacific Areas, and between this region and Europe, will remain generally the same.

North Atlantic — Passenger fares over the North Atlantic between U.S. east coast gateways and Europe will remain unchanged, except for slight adjustments in through fares to interior points in Europe made necessary by alterations to continental tariffs.

North Pole — Fares were agreed for both first and tourist class services from the West Coast of North America to Copenhagen via Canada and Greenland. Because of the shorter distance between these points as against the normal route across the American continent and over the North Atlantic, the North Pole fare will be above $18 cheaper to certain Scandinavian points.

South Atlantic — Existing fare levels will be generally maintained, and a new "B" class service discount about 20 per cent below tourist, will be offered between Spain and South America in non-pressurized equipment.

Mid-Atlantic — Maintenance of the status quo. A special working group will attempt to rationalize the Mid-Atlantic fare structure during the coming year.

Trans-Pacific — Generally unchanged, over all routes between the Far East and Australasia and the Americas.

The Conferences did not agree on Cargo rates over the Atlantic. (This problem has been the subject of another Conference in New York in March, 1955.)

Tourist Traffic

A large amount of Conference time was spent in the review and revision of standards for the physical differences between first and tourist class services. A new list of specified minimum seating densities for tourist class in types of aircraft now in use, which eliminates a substantial number of special exceptions allowed during the present year, was agreed.

In an attempt to set long-range specifications which will assist airlines and manufacturers in designing future aircraft specifically for tourist services, the Conferences adopted in principle a formula which sets limits in terms of allowable floor space per passenger and a correlation between the width and pitch of the individual seat. (Pitch is the space between the front edge of one seat cushion and the front edge of the seat immediately in front.)

Because it was felt that the formula still fell short of fulfilling some requirements, the Conferences voted to set up a joint committee of airline technical and commercial experts to study it in relation to all aircraft now in use and with a view towards its possible adoption by the Conferences as an absolute rule next year.

Some alterations were made in the rules for tourist amenities in order to reinforce the restriction that tourist meals should be simple and inexpensive, while allowing more substantial breakfasts and giving carriers more

flexibility to express national characteristics within the limits of tourist menus.

Agency Matters

Results of the discussions of agency matters indicate that the airlines are aiming at the achievement of a reasonable stability in agency affairs for 1955-56. After three years of great change and development in air transport, involving new services, new tariffs and new agency arrangements, the Conferences felt that both agents and airlines need a breathing spell in which to sort out loose ends, iron out anomalies in existing rules, and to make the relationship between the airline and the agent more easy and efficient. Emphasis was on improvements in agency machinery, rather than any sweeping policy changes.

The airlines also took full account of pre-Conference talks at London early in September between IATA and the International Consultative Council of Travel Agents (ICCTA), which was also represented by official observers at IATA's Annual General Meeting in Paris last month. ICCTA's suggestions helped substantially in the effort to improve the IATA agency resolutions, not only by pointing out existing weak spots, but also by helping to avoid complications.

While no drastic changes in agency certification and inspection rules were enacted, the Conferences approved a series of measures designed to simplify IATA's machinery and tighten up its procedures.

The Conferences also reviewed and approved action taken by Agency Sub-Committees during the past year to keep the total of certificated agencies to the numbers actually needed to serve the public adequately without jeopardizing the livelihoods of active and productive locations. The Sub-Committees were instructed to keep the lists under constant country-by-country scrutiny to maintain these levels.

The process of certification of new locations set up by an approved agent in a Conference area other than that of its head office was simplified by another Conference decision, which gives the final word to the Agency Sub-Committee in the area of the new location. In view of the fact that the bonafides of the principal agency office involved would be well established, it was felt that the existing requirement for referral to the Conferences could be dropped.

In other phases of agency administration, the Conferences voted a mandatory requirement for nil sales reports by agents. They also decided that in cases where agents fail to settle outstanding accounts, they would be listed as being in default 25, rather than 30 days after the expiration of the present period of grace.

A number of specific proposals aimed at securing settlement of accounts within the specified periods were rejected by the Conferences on the grounds that the same object would be better achieved by stringent enforcement effort in particularly troublesome spots, than by increasing the load of paperwork and reporting on agents generally.

Proposals to permit the transportation of agents' wives at reduced fares were fully examined by the Conferences, both with reference to specific events and on a more general basis; as were several other proposals designed to ease the problems posed by present limitations on privilege transport for agents themselves.

The Conferences found, however, that fluctuations in seasonal demand and limitations of capacity on a number of routes create "bottleneck" situations which act as natural checks on the amount of reduced rate traffic which can be accommodated. It was felt that it would thus be impossible to make

concessions in one direction without setting up limitations in another, and that it would be best to leave present arrangements as they are.

However, some mechanical changes in the Conference resolutions will benefit agents in this regard. One provides that reduced fare transport over the lines of both partners on a pool route will only be counted against the agent's privilege allotment from one carrier, rather than from both, as at present.

Another change provides that the 75 per cent agent's discount can be applied to creative fares, as well as to normal tariffs.

Confusion over the period in which agency privilege tickets can be used was cleared up by a decision that while the outward journey must be taken within the calendar year of issue, the return trip may be taken within the normal validity period of the ticket, even though this may extend beyond the end of the year in question.

To assist in the administration of privilege travel, and to make certain that it is used only for bona fide employees of agencies, the Conferences also adopted a standard wording for all future travel applications and stipulated that these must be submitted in writing and on the agent's own letterhead.

The new IATA rules for consolidators, which were adopted a year ago and which came into effect last April, were reviewed by the Conferences in order to straighten out their provisions in the light of the first actual experience. A series of interpretations issued earlier this year by the IATA Traffic Director to clarify a dozen such clauses, and published in the trade press, were given formal effect by changes in the resolutions.

In particular, the Conferences voted to liberalize the rules so that groups of agents can join together to form consolidation enterprises, with the proviso that all partners must be IATA certificated agents.

In another decision, the Conferences voted to ban free pickup and delivery by the agent, unless charged for as an additional service. The rendering of this service without extra charge was considered to be in effect a rebate of the sort which would provoke unhealthy competitive practices as between agents.

Other Subjects

In order to make their worldwide tariffs more efficient and economical, as well as to prevent the attrition of normal revenues, the Conferences tightened up generally on special discount provisions, among them the so-called "open-jaw" rule by which round trip deductions are given for journeys which begin and end in nearby cities, rather than in the same place.

Existing provisions for students' discounts, which were set when only first class transportation was available on the routes affected, were also reviewed in the light of the spread of tourist and "B" class services throughout the world. The Conferences felt that these services now go a long way toward providing substantially cheaper travel within the normal tariffs structure for students travelling between homes and schools abroad, and agreed that discounts could be reduced from 50 per cent to 25 per cent in most areas, except on a few routes of which most are still served by first class only.

The airlines also voted unanimously not to absorb in their fares any airport service charges levied against passengers and shippers by governments.

The Conferences voted to hold their 1955 sessions next September in the eastern United States, after a preparatory meeting of tariffs technicians in Scandinavia or Spain during June.

HELICOPTER GROUP

The first session of the international working group of commercial helicopter operators which met in Montreal under the auspices of the International Air Transport Association in November, 1954, decided that any attempt to fix the characteristics of tomorrow's helibuses must be preceded by a realistic determination of the size and location of the city heliports they plan to use.

The IATA Group has adopted the principle that the helicopter must fit the landing area, rather than vice versa, as a basis for its attempts to determine the shape of rotorcraft operations throughout the world as far as commercial operators are concerned, the world air transport organization said. A special commission has already been put to work to explore the practical limits of landing spaces on the ground and on rooftops in city centers and will report to the IATA Group's next meeting at Brussels late in February.

A similar commission is drafting operational requirements for air traffic control, navigation and communications requirements for helicopters, while the technical secretariat of IATA has been put to work gathering data on what commercial operators believe should be the desirable economic characteristics and sizes of transport rotorcraft.

At the same time, the Group will urge manufacturers to pay special attention to the suppression of noise in the new aerial vehicles.

"The future development of the helicopter must very largely be conditioned by the fact that it will have to operate into the hearts of the world's cities," it was asserted on behalf of the Group by their Chairman, Capt. Anselme Vernieuwe, Vice President of SABENA Belgian Airlines.

Pointing out that this decision marks a radical departure from the traditional course of fixed-wing aircraft development, he added: "With the fixed-wing aircraft, we could almost always design the airplane and then find enough landing area for it somewhere out in the country. But now that the helicopter has moved air transport downtown we must design the vehicle to fit the accommodation actually available to it well inside built-up areas."

All companies represented agreed in principle that while helicopter operations are by nature short range, their problems are universal and the solutions to them most likely to be found by international consultation. The Group also accepted four other major principles, as follows:

(1) Helicopter problems are of interest to all airlines, even though they may never intend to use them, if only because they must share the same air space in terminal areas.

(2) The Helicopter must be given a chance to develop on the basis of its own capabilities as we know them now and as experience will reveal them further.

(3) The helicopter must not be fettered by confinement to the limitations of fixed-wing-aircraft — we must not accept fixed-wing answers to helicopter questions.

(4) Regulation of helicopter operations should not become rigidly fixed before experience proves the need for regulation and the most desirable ways of applying it. We find that the helicopter is making its own rules, day by day.

The Group also hopes to provide manufacturers with operational data and specifications of operators' needs to serve as a reliable basis for future designs.

In this respect, the group unanimously felt that simplicity must be the keynote of helicopter design and operation because simplicity is the only answer to the higher flying costs imposed by the lesser aero-dynamic efficiency of rotorcraft, and by the necessity of flying them into a far higher number of ground stations on short routes.

For the same reasons, the group felt that the utmost simplicity in procedures, paperwork and the handling of passengers, baggage and freight must be achieved.

Heliport Limitations and Operational Requirements

Parallel groups of European and North American operators have been put to work on the related questions of heliport size and location and performance requirements, with instructions to coordinate their work so that compatible recommendations can be brought to the Brussels meeting next year.

The heliport commission will look into such locational problems as proximity to traffic and city services, obstruction profiles of surrounding buildings, noise, air traffic control, sitting of approach aids, weather, wind direction and turbulence.

They will also attempt to formulate principles influencing dimensions and layout of take-off and alighting areas, space for loading, servicing, maintenance and parking — and taking into consideration such factors as cost, size of city blocks and the like. In addition, they will consider visual aids, refuelling and loading procedures, group operating safety problems, and questions of ownership and operation of heliports. They were told to apply their studies to ground-level and roof-top heliports and to facilities at conventional airports as well.

The commission on operational requirements will attempt to draft performance criteria for multi-engine helicopters during all phases of flight, but especially within the practical landing area limitations developed by the heliport group. The IATA group agreed, however, that these criteria should be sufficiently flexible to allow operators to use various operational techniques within the limits of safety, so as not to throttle experiment and inquiry.

Guidance for Manufacturers

Members of the group will also prepare for the Brussels meeting forecasts of the desirable size and economic characteristics of future helicopters, based upon their individual routes. These will be analysed by IATA to determine whether they can be boiled down to certain basic types and sizes which could cover all types of commercial operations. It was felt that in this way, operators could work with manufacturers to avoid the heavy capital and maintenance costs of too great a variety of sizes and types of machines.

The Group considered that because of the high proportion of in-town operations forecast, noise suppression is a paramount problem, but one which they were confident could be overcome. In bringing this need to the attention of manufacturers, they noted that suppression can be accomplished by mechanical means in the construction of the helicopter, as well as by careful routing of operations and suppression or deflector walls around heliports. They felt as well that the problem is principally one of external noise since over the short distances of helicopter operation, passengers show little sign of being bothered by the noise of existing vehicles.

Some of the matters discussed included various types of vertical, forward, rearward, and spiral take-off techniques; holding and hovering positions; instrument flying techniques; hail and icing; identification lighting; auto-

stabilization; and the like. On the same basis, they also discussed crew position and numbers; primary flight instruments and cockpit comfort and visibility standards.

It also commissioned the drafting of a draft presentation of the kind of technical data, including flight and maintenance manual information which the operators require of manufacturers. Noting that the life of instruments and radio equipment in helicopters is less than that of similar equipment in aircraft, due to low frequency vibration, the Group stated a requirement for improved instrument and radio shock mountings.

Air Traffic Control

A similar discussion of air traffic control problems, which were considered still to be in a fluid and exploratory stage, was carried on as a preface to the special review of navigational and communications facilities and equipment requirements which was commissioned by the Group.

The latter study will analyze radio navigation aids in terms of operational requirements for en-route aids on existing airways, on new helicopter routes, and on off-airways operations; in terminal areas for holding and initial approach purposes; for approach and landing; as well as for the integration of these aids in the helicopter. Communications equipment needs will be examined with the idea of deriving operational requirements for air-to-ground facilities for control and company communications purposes, and for point-to-point communications.

INTERNATIONAL CHAMBER OF COMMERCE

COMMISSION ON AIR TRANSPORT

The 83rd Session of the Council of the I.C.C. in March, 1955, approved the following draft resolution for submission to the Fifteenth Congress of the I.C.C. to be held in Tokyo in May, 1955:

Confirming its Resolution No. 15 B, adopted at the Fourteenth Congress in Vienna, May, 1953, the I.C.C. emphasizes again that a Revision of the Convention would be unwise at the present time. The revision seems particularly inexpedient since the discussions concerning the revision of the Convention, in particular of Art. 25, have shown that no unanimity can be reached.

If, however, there were to be general agreement among the Signatory States on the need for certain amendments, the I.C.C., confirming its Vienna Resolution, considers that such amendments should be confined to a few essential points, such as those mentioned below, on which general agreement may be reasonably expected and which should be incorporated into an additional protocol to the existing Convention. In this sense, the I.C.C. appreciates the position adopted at Rio de Janeiro by the Legal Committee of the ICAO, which abandoned the idea of drawing up a new Convention and confined itself to including a few amendments in the Draft Protocol. However, as regards this text, the I.C.C. wishes to repeat its recommendation that such a Protocol should not become effective until ratified by three-quarters of the Signatory States to the existing Convention.

As regards the traffic documents, the I.C.C. welcomes the simplification of these documents proposed by the "Legal Committee" of the ICAO in the Rio Protocol but feels that the possibility of further simplification should be more explored.

Details of the particulars to be included in the passenger ticket and baggage check should not be laid down in the Convention. Some form of ticket and baggage check is necessary but its description in the Convention,

if any, should be kept as simple as possible. All details concerning air waybills should be omitted from the Convention and the precise form of the documents should be left to air carriers and users to evolve in the light of commercial experience.

With regard to the liability of the air carrier, the I.C.C. is of the opinion that, as it has recommended in the opening paragraph of this resolution, the limits referred to in Art. 22 and the wording of Art. 25 should remain unchanged. If, however, the Diplomatic Conference decides to revise Art. 25 along the lines proposed in the Rio Protocol, the I.C.C. believes that it would then be necessary to compensate for this by making an appropriate increase in the limits of liability, the size of this increase being left to the appreciation of the governments.

OBSERVATIONS AND COMMENTS ON FOREIGN CASES

Ass. Calcio Torino/A.L.I., Corte die Cassazione, Rome, March 9, 1953.—*Facts:* In the crash of an Italian airliner near Turin, May 4, 1949, the whole team of the Football Club of Turin, en-route from Lisbon (Portugal) to Turin (Italy), was killed. The Club claimed damages. The claim was dismissed both by the first and by the second instance (Tribunale di Torino, 1950, and Corte di Appello di Torino, 1952).—*The Court:* Article 24, para. 1, of the Warsaw Convention does not bar damage actions based upon an extra-contractual fault of the carrier, but such actions too can only be brought subject to the conditions and limits set out in the Convention. The question "as to who are the persons who have the right to bring such an action and what are their respective rights" (Article 24, para. 2 of the Convention) being subject to substantive Italian law, a right of action against the air carrier is vested but in the persons whose damage was caused by the infringement of an absolute right (i.e. a right *erga omnes*) and was a direct consequence of the damaging deed (Cod. civ., Art. 1223). For want of this direct link, the right of action of claimants must be denied.—*Remarks:* With regard to the possibility of basing a damage action within the ambit and the limits of the Convention upon extra-contractual relations, this case may be joined to the examples listed in our remarks to the Munier/Divry case, 21 J. of Air Law & Com., 369, 1954). The conflict rules according to which the Court applied its own substantive law in the present case are not mentioned in the decision; considering the plethora of factual links to Italian law, this is unfortunate but by no means uncomprehensible (in the Munier/Divry case too there was "general agreement" as to the applicability of substantive French law). The decision has already been published in the "Zeitschrift für Luftrecht" (1955, p. 70), with interesting remarks (by Reemts) which show that under German law the decision, reached by quite different ways and means, would probably have been the same.

DR. WERNER GULDIMANN

Gallais vs. Aero Maritime, Ltd.—Tribunal Civil de la Seine (5e) Chambre), Paris, April 28, 1954.—*Facts:* On November 11, 1952, at 5:25 GMT a C-54 took off from Fort Lamy (Tchad) for a regular flight to Beyrouth (Syria). In fair weather and daylight, the pilot-in-command continued after take-off to hold the aircraft on a very low altitude. After ten minutes of low-level flight, the aircraft touched the top of two contiguous trees and crashed. Mr. Gallais, the only passenger of the flight, travelling under a Warsaw contract of carriage, was killed. His widow claimed from the carrier 100 million French francs as compensation for the total damage caused to herself and her two children by the death of her husband.—*The Court:* By willfully holding a regular flight for public transportation on a dangerously low level after take-off, the pilot-in-command infringed an elementary rule of flight discipline. He showed a conscious temerity or a carelessness crazy to such a degree that consciousness could be presumed or that it was inexcusable, his conduct thus constituting "wilful misconduct" according to Anglo-Saxon law and, the more so (*à plus forte raison*), the fault being equivalent to dol in French law.—*Remarks:* As has justly been pointed out elsewhere (Revue française de droit aérien, 1954, p. 190), the most interesting aspect of the judgment, which belongs to the recent series of French judgments on Article 25 of the Warsaw Convention, is the care shown by the Court to establish the element of consciousness in the pilot's conduct and thus to bring it into the orbit of "wilful misconduct," at the same time distinguishing the latter concept from the fault which is in

French law equivalent to *dol* and which is implicitly presupposed to be rather more ample than the Anglo-Saxon notion.

DR. WERNER GULDIMANN (Zurich)

Royal Aero Club of Victoria vs. Commonwealth of Australia — There have been no decisions in any Australian courts on the meaning of the expression "wilful misconduct" as used in the Warsaw Convention. Litigation is at present pending in both U.S.A. and Australian courts arising out of a fatal accident to an Australian aircraft in California in which the question of wilful misconduct will have to be considered. In a recent decision delivered on Nov. 8, 1954 (as yet unreported), Mr. Justice Webb of the High Court of Australia had occasion to consider the meaning of the term "wilful misconduct" as used in a contract between the Commonwealth of Australia and the Royal Victorian Aero Club for the instruction and training by the Club of Royal Australian Air Force trainees.

The agreement provided that where damage was caused to Club property from wilful misconduct of a trainee the Commonwealth would recompense the Club for such damage. Whilst being flown by a trainee in the course of solo forced landing practice, an aircraft owned by the Club fouled high tension wires and crashed and was totally destroyed. The Club sued the Commonwealth under the agreement for the value of the aircraft.

The trainee who was very near the completion of his course had been instructed that in solo forced landing practice he was not to come below 200 feet. By the time he descended to that height he should have known whether he could safely land in the field selected by him if he had continued; but whether he knew this or not, at that height he should then open the throttle and resume normal flying. The trainee gave evidence that when he had descended to about 200 feet in the course of the practice he was not absolutely certain whether he would have made the field which he had selected for landing, or whether he was landing dead into the wind, so he came down "slightly" further to check on these two points. At about 50 to 70 feet he noticed two wires running across the boundary fence and opened the throttle and pulled back on the stick. This would ordinarily have enabled the aircraft to clear the wires but the engine spluttered and the aircraft hit the wires and crashed nose down. He was aware that he was flying below 200 feet, it was part of the exercise to be aware of it, but he did not think of the instruction about not coming down below 200 feet. It was conceded that the trainee would have been guilty of wilful misconduct if he had recollected as he came below 200 feet that he was acting contrary to instructions but still continued to descend instead of going up again.

The Court held that in considering the meaning of the term "wilful misconduct" it was proper to have regard to the context of the particular contract but subject to that there was no reason why the meaning given to a similar term in contracts for carriage by railway should not be applied. In none of the English railway cases either the context or the subject matter required a departure from the natural meaning of the term "wilful misconduct." For the purpose of the agreement the Court thought that the meaning of "wilful misconduct" was best expressed by Brett L. J. in *Lewis vs. Great Western Railway* (LR 3 Q.B.D. at 210-11) as follows:

> "In a contract where the term wilful misconduct is put in as something different from and excluding negligence of every kind, it seems to me it must mean the doing of something, or omitting to do something,

> which it is wrong to do or omit, when the person who is guilty of the act or omission knows that the act which he is doing, or that which he is omitting to do, is a wrong thing to do or omit, and it involves the knowledge of the person that the thing he is doing is wrong. . . . Care must be taken to ascertain that it is not only misconduct but wilful misconduct, and I think that those two terms together import a knowledge of wrong on the part of the person who is supposed to be guilty of the act or omission."

The question to be considered in this case was — did the trainee know and appreciate that it was wrong conduct on his part in the existing circumstances to do or fail to omit to do a particular thing and yet intentionally did or failed to do or omitted to do it? Or, to put it another way, did the trainee act with reckless carelessness, not caring what the results of his carelessness might be? The Court held that the answer to both questions on the evidence in this case was that he did not.

ROBERT EDWARDS*

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STATE AND LOCAL REVIEW

UNIFORM AIRCRAFT FINANCIAL RESPONSIBILITY ACT

AT THE 1954 annual meeting of the National Conference of Commissioners on Uniform State Laws, one of the acts approved was the Aircraft Financial Responsibility Act. In commenting on this act Willoughby A. Colby, Vice-President of the Conference writes in the January 1955 issue of the American Bar Association Journal as follows:

> "The Uniform Aircraft Financial Responsibility Act is the product of several years' work of the Commissioners on Uniform State Laws with the National Association of State Aviation Officials, the Association of Casualty and Surety Companies and the United States Aviation Underwriters. These organizations and related interests are ready to recommend the adoption of this act in most of the states. It has been checked, section by section, with representatives of such organizations, and has been approved as satisfactory to the state officials and to the industry.
>
> "In 1952, the Civil Aeronautics Board announced proposed regulations for compulsory insurance of air carriers which were submitted to the industry and the parties who were or might be affected thereby.
>
> "There was substantial protest to the adoption of such regulations, one of the grounds being that under the federal act there was no authority for the adoption of such regulations, and on June 10, 1953, the Civil Aeronautics Board announced that the proposed regulations had been withdrawn.
>
> "During this period, the National Association of State Aviation Officials, casualty companies and others interested felt that if the states showed some interest in this field and if there was a movement throughout the United States to adopt a Uniform Act which would take care of the situation of financial responsibility for the navigation of aircraft, it might prevent further action by the Civil Aeronautics Board or an attempt to amend the federal statute to give the authority for such regulations to be adopted by the Civil Aeronautics Board.
>
> "This Act is based upon the so-called "Uniform Motor Vehicle Safety Responsibility Act," which is one of the acts constituting the "Uniform Vehicle Code," first formulated in 1934. This has been periodically reviewed and revised by the National Committee on Uniform Traffic Laws and Ordinances, which is a part of the President's Highway Safety Conference carried on in cooperation with the bureau of Public Roads." [1]

UNIFORM AIRCRAFT FINANCIAL RESPONSIBILITY ACT

[AN ACT to provide for the giving of security by owners and operators of aircraft involved in accidents; to provide for administration thereof; to provide penalties for violation of any provisions of this Act; and to repeal all other acts or parts of acts inconsistent with or contrary to this Act.]

Be it Enacted . . .

SECTION 1. *Definitions.* As used in this Act, unless the context requires otherwise:

(a) "Agency" means the [Department of Aeronautics] of this state.

[1] Colby, "The 1954 Uniform and Model Acts: A Summary and an Analysis," 41 ABA Jour. 39, 40 (1955).

(b) "Aircraft" means any contrivance now known, or hereafter invented, used or designed for navigation of or flight in the air.

(c) "Judgment" means any judgment which has become final by expiration without appeal of the time within which an appeal might have been perfected, or by final affirmation on appeal, rendered by a court of competent jurisdiction of any state or of the United States, upon a claim for damages suffered by a claimant arising out of the ownership, operation, maintenance or use of any aircraft, including damages for care and loss of services, because of bodily injury to or death of any person or injury to or destruction of property, including the loss of use thereof, or upon agreement of settlement for such damages.

(d) "Non-resident's Operating Privilege" means the privilege conferred upon a non-resident by the law of this state pertaining to the operation by him of an aircraft, or the use of an aircraft owned by him, in this state.

(f) "Operator" means any person who is exercising actual physical control of an aircraft.

(g) "Owner" means any of the following persons who may be legally responsible for the operation of an aircraft:

(1) A person who holds the legal title to an aircraft;

(2) A lessee of an aircraft;

(3) A conditional vendee, a trustee under a trust receipt and a mortgagor or other person holding an aircraft subject to a security interest.

(h) "Passenger" means any person in, on or boarding an aircraft for the purpose of riding therein, or alighting therefrom following a flight or attempted flight therein.

(i) "Person" means any individual, firm, co-partnership, association or corporation, public or private, including his or its successors, assignees or legal representatives.

[(j) "Registration" means a certificate of registration of aircraft engaged in air navigation in this state, or of operators thereof, issued by the Agency pursuant to the laws of this state.]

COMMENT. *This definition is to be included if registration of aircraft or operators is provided for by state law.*

[(k) "Resident's Operating Privilege" means the privilege conferred upon a resident by the law of this state pertaining to the operation by him of an aircraft, or the use of an aircraft owned by him, in this state.]

COMMENT. *This definition is unnecessary if registration of aircraft or operators is provided for by state law.*

(l) "Notification" means notice in writing served upon a person by either:

(1) Actual delivery or offer of delivery to such person by any adult individual whose rights are not affected by the proceeding involved; or

(2) Registered mail addressed to the person at the last address known to the Agency.

(m) "State" means any state, the District of Columbia, any territory or possession of the United States and the Commonwealth of Puerto Rico.

(n) "Claimants" means any person having a claim for damages as the result of an accident within this state involving an aircraft.

SECTION 2. *Agency to Administer Act—Appeal to Court.* (a) The Agency shall administer and enforce the provisions of this Act and may make rules and regulations necessary for its administration [which shall become effective ten days after the filing thereof with the Secretary of State.]

(b) The Agency shall provide for hearings upon request of any person who may be affected by its orders or acts under the provisions of this Act and may provide for a stay thereof until a hearing may be had.

[(c) Any person aggrieved by any order or act of the Agency or by a fail-

ure of the agency to act hereunder, may have judicial review thereof as provided in the General Laws of this state for judicial review of the orders or acts of administrative agencies.]

[(d) Any person aggrieved by any order or act of the Agency hereunder, may have judicial review thereof [here insert language indicating scope of the review] by [appeal] to the [circuit] Court of [——— County] by the filing of written [notice of appeal] with the Agency within [30] days after the order or act becomes final. The Agency shall transmit to the Court the original or a certified copy of the entire record of the proceeding under review, including a transcript of any oral testimony taken at the hearing, at the cost of the appellant. By order of Court or by stipulation of all parties to the [appeal], the record may be shortened by the elimination of any portion thereof. The Court shall determine whether the filing of the [appeal] shall operate as a stay of any such order or act of the Agency and the terms of such stay. The Court may, in disposing of the issues before it, affirm, modify or reverse the order or act of the Agency in whole or in part and may enter its own order or may reverse and remand the cause for further proceedings by the Agency.

COMMENT. *The second alternative paragraph may be utilized in those states not having a general administrative review statute.*

SECTION 3. *Report Required Following Accident.* (a) The operator of any aircraft involved in an accident within this state in which any person is killed or injured or damage in excess of $100.00 is sustained to the property of any person, other than property owned by the owner or operator or in his care, custody or control or carried in or on the aircraft, shall immediately but not later than forty-eight hours after the accident report the matter in writing to the Agency. If the operator is physically incapable of making the report, the owner of the aircraft involved in the accident, shall immediately but not later than forty-eight hours after learning of the accident, make the report. If neither the operator nor the owner is physically capable of making the report, then each passenger shall, within ten days after learning of the incapacity of the operator or owner, make the report. If the owner or operator dies as a result of the accident, the legal representative of the operator or owner shall make the report within ten days after his qualification. The [sheriff] of the [county] in which the accident occurred shall notify the Agency thereof in writing immediately but not later than forty-eight hours after learning of the accident.

(b) The report, the form of which shall be prescribed by the Agency, shall include information to enable the Agency to determine whether the requirements for the deposit of security under Section 4 are inapplicable by reason of existence of insurance or other exceptions specified in this Act. The Agency may rely upon the accuracy of the information until it has reason to believe that the information is erroneous.

(c) The operator and the owner shall furnish such additional information as the Agency may require.

SECTION 4. *Security Required—Suspension—Exceptions.* (a) As promptly as practicable but not later than thirty days after receipt of an accident report as required in Section 3, the Agency shall determine by an order entered of record (1) the amount of security within the limits specified in Section 5, which it deems sufficient to satisfy any judgment for damages resulting from the accident which may be recovered against each owner or operator, and (2) the name and address of each claimant.

(b) As promptly as practicable but not later than thirty days after the entry of the order required by sub-section (a) of this Section the Agency, unless there is deposited for the benefit of the owner or operator or both, as the case may be, security in the sum so determined by the Agency, upon ten days notification shall suspend:

(1) If the owner is a resident, the [registration] [resident's operating

privilege] of the owner and the [registration of] [right to have operated for him] all aircraft owned by him.

(2) If the owner is a non-resident, the non-resident's operating privilege of the owner and of all aircraft owned by him.

(3) The [registration] [resident's] or non-resident's operating privilege of the operator.

(c) The requirements as to security and suspension do not apply:

(1) To the operator or the owner of the aircraft if the Agency determines upon satisfactory evidence that he is not charged with responsibility for the accident by the claimants, or to the operator of an aircraft involved in an accident in which no injury was caused to the person of any one other than the operator, and no damage in excess of $100.00 was caused to property not owned, rented, occupied or used by such operator nor in his care, custody or control nor carried in or on the aircraft;

(2) To the operator or owner of an aircraft if at the time of the accident the aircraft was stationary, without passengers thereon or boarding the aircraft or alighting therefrom and the aircraft was parked in an area legally used for aircraft parking with no engine running nor in the process of being started;

(3) To the owner of an aircraft if at the time of the accident the aircraft was being operated, or was parked, without his permission, express or implied:

(4) To the owner if there is in effect at the time of the accident an aircraft liability policy or bond with respect to the aircraft involved in the accident;

(5) To the operator, if not the owner of the aircraft, if there is in effect at the time of the accident an aircraft liability policy or bond with respect to his operation of the aircraft involved in the accident;,

(6) To the operator or owner if his liability for damages resulting from such accident is covered by any other form of liability insurance policy or bond in effect at the time of the accident;

(7) To any person qualifying as a self-insurer under Section 7, or to any person operating an aircraft for the self-insurer for whose acts the self-insurer is legally responsible; nor

(8) After there is filed with the Agency satisfactory evidence that the person otherwise required to deposit security has

(i) been released from liability, or (ii) been adjudicated not to be liable by judgment, or (iii) executed a written agreement with all claimants providing for payment of any agreed amount with respect to all claims for injuries or damages resulting from the accident.

(d) The requirements as to suspension may be waived by the Agency, in its discretion, if there is filed with the Agency by all claimants consent in writing that the person hereunder chargeable be allowed continuing operating privilege. If such waiver is granted by the Agency, it shall continue for six months from the date of the consent and thereafter unless the consent is revoked in writing.

(e) The Agency may take the actions authorized hereby or may modify or rescind the same at any time necessary to carry out the provisions of this Act upon [ten] days notification of the persons affected hereby.

COMMENT. *"Registration" should be used if registration of aircraft or operators is provided for by state law. "Resident's" should be used if the state law does not provide for registration of aircraft or operators.*

SECTION 5. *Requisites of Policy or Bond*—(a) A policy or bond is not effective under Section 4 unless:

(1) Issued by an insurer or surety company authorized to do business in this state; or

(2) Insured by an insurer or surety company not authorized to do

business in this state found by the Agency to afford adequate protection and which has filed or shall file with the Agency a power of attorney authorizing the Agency to accept service on its behalf of notice or process in any action upon the policy or bond arising out of such accident.

(3) If the accident results in bodily injury to or death of a person not a passenger, the policy or bond provides coverage of not less than [$5,000] because of bodily injury to or death of one person in any accident and [$10,000] because of bodily injury to or death of two or more persons in any one accident.

(4) If the accident involves an aircraft being operated for hire and the accident results in bodily injury to or death of a passenger, the policy or bond provides coverage of not less than [$10,000] because of bodily injury to or death of one person in any one accident and not less than [$10,000] multiplied by the number of passenger-seats in the aircraft because of bodily injury to or death of two or more persons in any one accident.

(5) If the accident involves an aircraft not being operated for hire and the accident results in bodily injury to or death of a passenger, the policy or bond provides coverage of not less than [$5,000] because of bodily injury to or death of one person in any one accident and not less than [$5,000] multiplied by the number of passenger-seats in the aircraft because of bodily injury to or death of two or more persons in any one accident.

(6) If the accident results in damage to or destruction of property, the policy or bond provides coverage of not less than [$5,000] because of damage to or destruction of property in any one accident with the exception of the following property which is exempted from the security required under this Act: property owned, rented, occupied or used by, or in the care, custody or control of the owner or operator or carried in or on the aircraft.

(b) The policy or bond need not cover:

(1) Any liability on account of bodily injury to or death of any employee of the owner or operator while the employee is engaged in the duties of his employment; or

(2) Any obligation for which the owner or operator or his insurer may be held liable under any workmen's compensation law.

SECTION 6. *Duration of Suspension*—[Registrations] [Resident's] or non-resident's operating privilege suspended as provided in Section 4 shall not be restored or renewed with respect to the aircraft involved in or the owner or operator liable for the accident until:

(a) Security is deposited as required under Section 4; or

(b) One year shall have elapsed following the date of such suspension and satisfactory evidence is filed with the Agency that during such period no action for damages arising out of the accident has been instituted; or

(c) Satisfactory evidence is filed with the Agency of a release from liability, or a judgment of non-liability as to all persons damaged or injured in the accident, or a written agreement, in accordance with paragraph 8 of sub-section (c) of Section 4. If there is a default in payment under such written agreement, then upon [ten] days notification of the owner or operator, the Agency shall suspend the [registration] [resident's] or non-resident's operating privilege of such person defaulting and the same shall not be restored unless and until (1) such person deposits and thereafter maintains security as required under Section 4 in such amount as the Agency may then determine, within the limits herein provided, or (2) one year has elapsed following the time when such security was required and during such period no action upon the agreement has been instituted in a court of this state; or

(d) Satisfactory evidence is filed with the Agency that any judgment

against such person for damages resulting from the accident has been satisfied in full or that there has been paid thereon an amount equal to the applicable limits set forth in Section 5; or

(e) Written consent thereto has been filed with the Agency by all claimants and the same is approved by the Agency in its discretion.

COMMENT. *The first bracketed word or phrase in each instance should be used if registration of aircraft or operators is provided for by state law. The second bracketed word or phrase should be used if the state law does not provide for registration of aircraft or operators.*

SECTION 7. *Self-Insurer*—(a) Any person may at any time apply to the Agency for a certificate of self-insurance, whether or not there has occurred an accident as a result of which he might be affected by some other provision of this Act.

(b) The Agency may in its discretion issue a certificate of self-insurance when satisfied that the applicant is possessed and will continue to be possessed of ability to pay judgments against him within the limits provided in this Act.

(c) Upon not less than [ten] days notification of a self-insurer the Agency may for reasonable cause cancel a certificate of self-insurance and shall cancel such certificate upon failure to pay any judgment within thirty days.

SECTION 8. *Application to Non-resident's [unregistered Aircraft] and Accidents in Other States*]—(a) In case the operator or owner of an aircraft involved in an accident within this state [has no certificate of registration, or is a non-resident] [is a non-resident], he shall not be allowed [a certificate of registration or] a non-resident's operating privilege, [as the case may be,] until he has complied with the requirements of this Act.

(b) When a non-resident's operating privilege is suspended pursuant to Section 4 or Section 6, the Agency shall transmit a certified copy of the record of such action to the official or department regulating the operation of aircraft in the state in which the non-resident resides, if the law of the other state provides for action in relation thereto, similar to that provided for in subsection (c) of this Section.

(c) Upon receipt of a certification that the operating privilege of a resident of this state has been suspended or revoked in any other state pursuant to a law providing for its suspension or revocation for failure to deposit security for the payment of judgments arising out of an aircraft accident, under circumstances which would require the Agency to suspend a non-resident's operating privilege had the accident occurred in this state, the Agency upon [ten] days notification shall suspend his [registration] [resident's operating privilege] if he was the operator of an aircraft involved in the accident, or if he was the owner of an aircraft involved in the accident and was legally responsible for its operation. The suspension shall continue until the resident furnishes evidence of his compliance with the security requirements of the law of the other state.

SECTION 9. *Form and Amount of Security*—(a) The security required under this Act shall be cash or securities permissible under state law as security for deposit of state funds and in such amount as the Agency may require but in no case in excess of the limits specified in Section 5 in reference to the limits of a policy or bond. If at the time of the accident there is in effect a liability policy or a bond meeting the requisites of this Act other than amount of coverage set forth in Section 5, the Agency may consider such policy or bond in fixing the amount of security. The person depositing security shall specify in writing the person or persons on whose behalf the deposit is made and, at any time while such deposit is in the custody of [the Agency or the State Treasurer] the person depositing it may, upon approval of the Agency, amend in writing the specification of the person or persons on whose behalf the deposit is made to include an additional person or persons; provided, however, that a single deposit of security shall be applicable only on behalf of

persons required to furnish security because of the same accident. [Interest and other income upon securities deposited as herein provided shall be paid or inure to the benefit of the person making the deposit.]

(b) Upon [ten] days notification of the parties concerned, the Agency may reduce, or, within the limits specified in Section 5, increase the amount of security ordered in any case if in its discretion the amount ordered is excessive or insufficient. In case the security originally ordered has been deposited, the excess shall be returned to the depositor notwithstanding the provisions of Section 10. Substitution of security shall be permitted.

SECTION 10. *Custody, Disposition and Return of Security*—Security deposited in compliance with the requirements of this Act shall be delivered to the [Agency and shall be placed by the Agency in the custody of the State Treasurer] and shall be released only:

(a) Upon certificate of the Agency in the payment of a judgment rendered against the person or persons on whose behalf the deposit was made, for damages arising out of the accident in a civil action, begun not later than one year after the date of the accident or within one year after the date of deposit of any security under sub-section (c) of Section 6 or in the payment of a settlement, agreed to by the depositor and all the claimants, of a claim or claims arising out of the accident.

(b) Upon certificate of the Agency issued after [ten] days notification of all claimants upon evidence satisfactory to the Agency that all claims arising from such accident have been satisfied by either (1) a release from liability, or (2) a judgment of non-liability, or (3) a written agreement in accordance with paragraph 8 of sub-section (c) of Section 4, or whenever, after the expiration of one year from the time of the accident or from the date of deposit of any security under sub-section (c) of Section 6, the Agency is given evidence satisfactory that there is no such action pending and that no judgment rendered in any such action is unpaid.

(c) Upon the certificate of the Agency that other security complying with sub-section (a) of Section 9 and satisfactory in form, character and amount, has been deposited with it in lieu of the original security deposited hereunder.

SECTION 11. *Matters Not to be Evidence in Civil Suits or Criminal Proceedings*—The records of and proceedings before the Agency [and the State Treasurer] shall be inadmissible in evidence and shall not be referred to at the trial of any civil action or criminal proceeding.

Subject to the foregoing provisions, the Agency shall, upon written request, make available to persons whose legal rights may be affected thereby, information and material developed in the course of its administration of this Act.

SECTION 12. *Transfer of Registration to Defeat Purpose of Act Prohibited.*—No transfer of registration of aircraft of which the owner's registration has been suspended hereunder, shall be deemed valid or accepted by the Agency, unless the transferor or transferee demonstrates to the satisfaction of the Agency that the transfer of registration is the result of a bona fide transaction of purchase and sale, and not for the purpose, or with the effect, of defeating the purposes of this Act. Nothing in this Section shall affect the rights of any lessor or conditional vendor, chattel mortgagee, or other person holding a security interest in any aircraft registered in the name of another as owner who becomes subject to the provisions of this Act.

COMMENT. *See Comment to Section* 13.

SECTION 13. *Surrender of Registration*—Any person whose registrations are suspended as herein provided shall immediately surrender or return his registration certificates to the Agency, until such time as the registrations are restored by the Agency. If such person fails or refuses to surrender or return the registration certificates to the Agency, the Agency shall forthwith [issue] —[apply to the [Circuit] Court of [. . . County], which upon such application

shall issue] a writ directing any [peace officer or enforcement officer] of the state to secure possession thereof and deliver the same to the Agency.

COMMENT. *Sections* 12 *and* 13 *are necessary only if registration of aircraft is provided for by state law. If not and these sections are deleted, then the following sections should be correspondingly renumbered.*

SECTION 14. *Other Violations—Penalties*—(a) Any owner or operator who knowingly refuses or fails to make any report of an accident as required in Section 3 shall be guilty of a misdemeanor and upon conviction shall be fined not more than [$100]; and if any person is killed or injured in such accident, the Agency shall in addition suspend the [registration] [resident's] or non-resident's operating privilege of the person failing to make such report, until such report is filed and for such further period not to exceed [thirty] days as the Agency may fix.

(b) Any owner or operator who knowingly makes a false statement or representation of a material fact in a report to or written instrument filed with the Agency shall be guilty of a misdemeanor and upon conviction shall be fined not less than [$100] nor more than [$1,000], or imprisoned for not more than [ninety] days, or both.

(c) Any owner or operator whose [registration] [resident's] or non-resident's operating privilege has been suspended or revoked under this Act and who, during such suspension or revocation, operates any aircraft in this State, or knowingly permits any aircraft owned by such person to be operated by another in this State, except as permitted under this Act, shall be guilty of a misdemeanor and upon conviction shall be fined not more than [$1,000], or imprisoned not more than [six] months, or both.

(d) Any owner or operator wilfully failing to return his registrations as required in Section 13 shall be guilty of a misdemeanor and upon conviction shall be fined not more than [$500], or imprisoned not to exceed [thirty] days, or both.

COMMENT. *Subsection* (*d*) *should be deleted if Section* 13 *is deleted, but should be retained if that section is retained.*

SECTION 15. *Non-Applicability*—This Act shall not apply to:

(a) Any aircraft owned and operated by or leased to and subject to the sole control of the United States or any civil or military agency of the United States or of the District of Columbia the Commonwealth of Puerto Rico or any territory or possession of the United States;

(b) Any aircraft owned and operated by or leased to and subject to the sole control of this or any other State or agency thereof or any political subdivision or municipality of this or any other State;

(c) Any aircraft owned and operated by or leased to and subject to the sole control of any foreign country or any civil or military agency thereof or any political subdivision or municipality thereof;

(d) Any aircraft owned or being operated by a public air carrier engaged principally in regularly scheduled interstate or foreign air transportation for hire under either a federal certificate of public convenience and necessity or under a letter of registration or exemption order issued by the Civil Aeronautics Board or its successor.

SECTION 16. *Act Not Retroactive*—This Act shall not apply with respect to any accident occurring prior to the effective date of this Act.

SECTION 17. *Act Not to Prevent Other Process*—Nothing in this Act shall be construed as precluding any party in any section or proceeding from employing other processes provided by law. Nothing in this Act shall be construed as precluding the utilization by the Agency of the injunctive or other process of the courts in aid of the enforcement of this Act.

SECTION 18. *Service of Process*—(a) The operation of an aircraft on the land or waters of or in the air over this state shall be deemed an appointment

by the owner or operator of the [Secretary of State] to be his true and lawful attorney upon whom may be served all legal process in any action or proceeding against him, arising from the ownership, maintenance, use or operation of such aircraft and resulting in damage or loss to person or property, and said use or operation shall be signification of their agreement that any such process against him which is so served, shall be of the same legal force and validity as though served upon him personally, provided such person is a non-resident of this state or at the time a cause of action arises is a resident of this state but subsequently becomes a non-resident of this state.

(b) Service of such process shall be made by serving [the original thereof and a copy of the [complaint] upon the [Secretary of State] or by filing the same in his office, together with a fee of $2.00 and by the mailing of a copy of such process and of the [complaint] by the plaintiff or his attorney to the defendant, and to each of the defendants if more than one at his last known address, within ten days thereafter by registered mail. In lieu of such mailing to such defendant in a foreign state, plaintiff may cause a copy of the [complaint] and process to be served personally in the foreign state upon such defendant by any adult person not a party to the suit, by actually delivering the same to such defendant or by offering to make such delivery in case defendant refuses to accept delivery.]

[(c) Proof of the service of such process upon the [Secretary of State] or the filing thereof in his office, and proof of the mailing or personal delivery thereof to the defendant shall be made by the affidavit or affidavits of the party or parties doing the acts, which shall be filed in the office of the Clerk of the Court in which the suit is filed. Process shall be deemed to be completed upon the filing of such affidavit or affidavits and of the original registry receipt issued by the Post-office upon the mailing of such registered letter, if service is obtained by mail.]

SECTION 19. *Discharge in Bankruptcy*—A discharge in bankruptcy shall not relieve any person from the requirements of this act.

[SECTION 20. *Use of Singular or Plural*—The singular includes the plural and the plural includes the singular; the masculine includes the feminine and neuter, as requisite.]

[SECTION 21. *Uniformity of Interpretation*—This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the laws of those states which enact it.]

SECTION 22. *Saving Clause*—If any part or parts of this Act shall be held to be invalid, such invalidity shall not affect the validity of the remaining parts of this Act. The legislature hereby declares that it would have passed the remaining parts of this Act if it had known that such part or parts thereof would be declared invalid.

SECTION 23. *Title of Act*—This Act may be cited as the Uniform Aircraft Financial Responsibility Act.

SECTION 24. *Effective Date of Act*—This Act shall take effect the ..... day of ....., 19.....

JUDICIAL AND REGULATORY DECISIONS

COVERAGE OF "NON-SCHEDULED" AIRLINES BY AIRLINE TRIP INSURANCE

IN ILLUSTRATION of special problems that have arisen from the extension of insurance coverage to commercial airline passengers[1] is found in the case of *Lachs v. Fidelity and Casualty Co. of New York.*[2] The decedent purchased from one of the defendant's insurance vending machines airline trip insurance which, by its terms, was to cover her only if she were injured or killed while boarding, riding as a passenger in, or alighting from a plane operated by a *scheduled* airline.[3] The court denied defendant insurance company's motion for a summary judgment even though the decedent had been killed while riding as a passenger in a plane operated by a non-scheduled airline.[4] Denial of the motion was primarily based on the finding that the term "scheduled airline" as used in the policy was ambiguous.

Turning to the Civil Aeronautics Act we find no mention of the term "scheduled airline." However, in speaking of those airlines required to obtain a certificate of public convenience and necessity,[5] the act exempted airlines "not engaged in scheduled air transportation." [6] This, itself, may not give meaning to the term "scheduled airline" in the policy, but it does give a basis for the Civil Aeronautics Board's classification of airlines into "scheduled" and "non-scheduled." This was carried out in the Code of Federal Regulations when the CAB ruled that all "scheduled" airlines must obtain certificates of public convenience and necessity,[7] while under authority of Section 416 of the Act[8] it ordered exemption from certificate requirements of "non-scheduled airlines." The terms "scheduled" and "non-scheduled" were also used by the

[1] Note, *Judicial Interpretation of Aviation Risk Exclusion Clauses*, 25 Notre Dame Law. 695 (1950); Kremlick, *Adjudicated Aviation Clauses in Life and Accident Insurance Contracts*, 25 Mich. State Bar J. 37 (1946). See also note 17 A.L.R. 2d 1040 (1951).

[2] 306 N.Y. 357, 118 N.E. 2d 555 (1954).

[3] The coverage clause reads in part "This insurance shall apply to such injuries sustained following the purchase by or for the Insured of a transportation ticket from . . . a Scheduled Airline . . . in consequence of: (a) boarding, riding as a passenger in, alighting from or coming in contact with any aircraft operated on a regular or special chartered flight by a *Civilian Scheduled Airline* (emphasis supplied) maintaining regular published schedules and licensed for interstate, intrastate or international transportation of passengers by the Governmental Authority having jurisdiction over Civil Aviation. . . ."

[4] The airline upon which decedent flew had been catagorized by the Civil Aeronautics Board as non-scheduled. However, it did offer more or less regular service between Miami and New York, so as to appear to the average person as a scheduled airline; that is, there were regularly four or five flights per week but the exact departure time was not known.

[5] 52 Stat. 987 (1938), 49 U.S.C. §481 (1952). In order to obtain a certificate of public convenience and necessity the airline must meet certain requirements as to its financial position, the community's need for its service, and its operation on a designated standard. (e.g. pilots must meet certain requirements, certain safety equipment must be used, and planes must be periodically inspected.)

[6] 52 Stat. 1005 (1938), 49 U.S.C. §496 (1952). This section also exempts certain other airlines that were "engaged in scheduled air transportation."

[7] 14 Code Fed. Regs. §61 (Cum. Supp. 1952). It was the defendant's major contention that this was the controlling distinction between "scheduled" and "non-scheduled" airlines and that only passengers riding on airlines that held certificates of public convenience and necessity were to be insured. The court did not accept this as conclusive.

[8] See note 6, *supra.*

CAB when it issued requirements[9] and rules[10] governing airline operations. The classification of "non-scheduled airlines" was originally created to handle the many diverse activities, such as sale and service of aircraft and accessories, flight instruction, field dusting, private flights, barnstorming, and the operation of airports, that could not be managed effectively by scheduled airlines. These regulations and rulings of the CAB, until the post war period, had given some content to the term "scheduled airline."

CAB Tests of "Scheduled"

Since the postwar period, however, the CAB has developed two tests to determine whether an airline is "scheduled" or "non-scheduled"; that is, whether or not it is required to obtain a certificate of public convenience and necessity. By the use of an objective test[11] the CAB will deem a non-scheduled airline to be giving scheduled service, in the eyes of the general public, if: (1) it involved the flight of one or more planes from a take off point in the United States or its possessions to some other landing point either in or out of the United States; (2) the air carrier held itself out to the public, by its operations or its advertising, as operating one or more planes regularly or with a reasonable degree of regularity between two such points; and (3) it allowed the public to believe that any applicant for transportation would be accepted as a passenger. In another ruling,[12] the CAB outlined a subjective test that it would use to determine in which category the airline operated. This test involves in large part the state of mind of both passenger and operator. If both feel that the flight was merely a one time affair with no thought of the trip reoccurring then it is non-scheduled. On the other hand, if the passenger and operator have made this trip many times and it is not looked upon as a special flight by either, then it is characterized as a regularly scheduled flight.[13]

A "scheduled" airline, therefore, may be defined as one that represents itself to the public by its operations and advertisements as offering regular service to all those who request it. Consequently it would appear possible, using either of the CAB's tests, for an airline to be thought of by the public as "scheduled" but to remain "non-scheduled" within the terms of the various administrative rulings because the CAB has not yet changed its classification.[14]

Although the courts have used the term "scheduled airline," for the most part they have failed to define it. However, in the majority of these cases,[15] the interested parties in the suits were well acquainted with the Civil Aeronautics Act, and administrative decisions of the CAB concerning the qualifications of a scheduled airline.[16] In cases in which the courts have attempted

[9] 14 Code Fed. Regs. §40 (Cum. Supp. 1952) establishes requirements for scheduled airlines while §292.1 (B) (1930) establishes the requirements for non-scheduled airlines.

[10] 14 Code Fed. Regs. §40 (Cum. Supp. 1951) outlines rules for scheduled airlines, while §42 controls non-scheduled airline operations.

[11] *Large Irregular Carriers, Exemptions*, 11 CAB 609, 612 (1950).

[12] 6 CAB 1049 (1946).

[13] *Id.* at 1054.

[14] In accord with this definition is *Weisman v. Guardian Life Insurance Co. of America*, 67 N.Y.S. 2d 604 (not officially reported), *affirmed without opinion* by the App. Div., 75 N.Y.S. 2d 273 App. Div. 761 (1st Dept. 1948), where the court thought that it was of little importance to construe the nature of the flight in accordance with the provisions of the Civil Aeronautics Act, 49 U.S.C.A. §401, as the average man could scarcely be required to interpret his insurance policy in the light of the Civil Aeronautic Law.

[15] *S.S.W., Inc. v. Air Transport Ass'n.*, 191 F. 2d 658 (D.C. Cir. 1951); *United States v. Eagle Star Ins. Co.*, 196 F. 2d 317 (9th Cir. 1952); Apgar *Travel Agency v. International Trans. Ass'n.*, 107 F. Supp. 706 (S.D.N.Y. 1952); *Putnam v. Air Transport Ass'n. of America*, 112 F. Supp. 885 (S.D.N.Y. 1953).

[16] See note 5, *supra*.

to define these terms, no consistency can be found. In a case quite similar to the principal one,[17] the deceased was insured as ". . . a fare paying passenger in a licensed commercial aircraft operated on a published schedule by an incorporated common carrier for passenger service . . . on a regular . . . air route. . . ." Recovery was granted even though decedent was riding in a plane registered by the CAB as "non-scheduled." The court rejected the insurance company's contention that since it was not operating on a published schedule, it was "non-scheduled." Although it is possible to interpret the words "operated on a published schedule" as meaning "operated on a schedule of times of flights" or "time table," the court stated that it was equally possible to interpret the phrase as meaning a "schedule of rates." [18] It was then held that this ambiguity in meaning should be resolved in favor of the insured. In another case[19] "scheduled trip," a term analogous to "scheduled airline," was held in view of its ambiguity, to mean a trip planned in advance, and not a trip described in a time table.

Similarities Now Weaken The Distinction

This classification of airlines into "scheduled" and "non-scheduled" categories would appear to be justified in light of past operations. However, because of the rapid growth of the air industry, an increasing similarity has arisen between the operations of these two groups. This similarity has materially weakened the distinct lines that the CAB had drawn to differentiate between the two classifications. Both are now required to obtain a certificate of operations,[20] both carry passengers, and both use the same kind of planes although the non-scheduled carriers have more seats in their planes. The large non-scheduled airlines, by pooling their resources, by advertising, and by special operations have offered an integrated service of regular flights to the public. By use of a common ticket agent they are able, if not individually, at least collectively to offer regular service. Another method used by non-scheduled airlines to give scheduled service is by the use of "route" operations.[21] These carriers have concentrated their operations to flights between relatively few large cities and as a result have been actually furnishing regular service[22] over such heavy traffic-generating routes as New York, Chicago, and Los Angeles; New York, Chicago, and San Francisco; and New York, Miami, and

[17] *Treide v. Commercial Casualty Co.*, 1950 U.S. Av. R. 161.

[18] *Id.* at 167.

[19] *Little v. Globe Indemnity Co.*, 1949 U.S. Av. R. 353.

[20] After the Second World War the growth of the non-certificated air carriers (non-scheduled) was tremendous, and as a result the CAB completely revised their exemption regulations and all carriers permitted to operate there-under were redesignated as "irregular air carriers." These carriers were required to obtain a certificate similar to that required of "scheduled airlines" in order to bring the level of operations and performance up to that of scheduled air carriers. 11 CAB 609, 612 (1950).

Prior to this time only scheduled airlines were required to hold any kind of certificate. Now a certificate of operations is required of non-scheduled airlines as well, describing the operations authorized and prescribing such operating specifications and limitations as may be reasonably required in the interest of safety. 14 Code Fed. Regs. §42.2 (Cum. Supp. 1952).

[21] By "route operations" the CAB refers to a pattern of operations which shows a concentration of relatively frequent and regular flights between a limited number of pairs of points.

[22] In *Civil Aeronautics Board v. Modern Air Transport*, 79 F. 2d 622 (1950), the defendant operated flights regularly between New York, N. Y., and San Juan, P. R., three or four times each week on Monday, Wednesday, Friday, and Saturday. The court held that this could not be classified as irregular service and enjoined the defendant from continuing such operations. The Miami Airlines, upon which the decedent flew in 1951, conducted an average of four flights a week from New York to Miami and return. Many times five or six flights per week were conducted.

Puerto Rico.[23] Consequently, though the average person uses the terms "scheduled" and "non-scheduled" airline,[24] it is doubtful whether he understands the technical difference between the two types of flights.

The court in the *Lachs* case found the language employed by the defendant in the insurance contract ambiguous, and ruled that this ambiguity be resolved against the insurance company.[25] The court further indicated that the method employed to sell the insurance materially added to the ambiguity of the terms of the policy. On the vending machine in small letters, and in the policy itself, was the statement that only passengers riding on a "scheduled" airline were covered.[26] On a wall in a waiting room near the ticket counter was a large sign listing all the non-scheduled airlines, including that of the defendant. However, the court felt that a jury could find the defendant was inviting non-scheduled airline passengers to insure themselves since the defendant had placed one of its automatic vending machines in front of the ticket counter which serviced non-scheduled airlines and the vending machine had the words "airline trip insurance," in large letters prominently lighted on it.

It is clear that the plaintiff should not recover if the deceased had (1) known that she was riding on a non-scheduled airline; (2) known the difference in the meaning of the words "scheduled" and "non-scheduled" airlines; and (3) read the insurance policy. On the other hand, if the deceased had not been aware of these three factors, it is equally clear that the plaintiff should be allowed recovery. If the deceased had read the policy without knowing the type of airline she was riding on or without knowing the difference between scheduled and non-scheduled airlines, the ambiguity would still be present and it would seem to follow that the plaintiff should recover.

While the problems of the preceding situations are readily resolved, the *Lachs* decision may offer no easy solution under other circumstances. For example, the deceased may have known she was a passenger on a non-scheduled airline and also the meaning of the two terms but may not have read the policy.

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[23] Table showing the degree of route operations of large irregular operations for the last two quarters of 1949. It is assumed that in recent years this type of operation has greatly increased with the ever increasing use of airline passenger transportation.

Pairs of Points	*Number of Carriers*	*Total one-way flights*
New York - Miami	21	1,017
New York - Los Angeles	18	753
New York - Chicago	26	688
New York - Detroit	9	638
Chicago - Los Angeles	20	585
Los Angeles - San Francisco	18	443

[24] For example, the following magazine titles: Cosmopolitan Magazine, March, 1951 "Don't fly the Unscheduled Airlines"; Harpers Magazine, May, 1949, letters to the editor; Time Magazine, May 2, 1949, "Death Sentence"; Time Magazine, April 9, 1951, "Death Edict"; Coronet Magazine, May, 1951, "Death Rides the Bargain Airlines."

[25] The great weight of authority supports this ruling. *Travelers Indem. Co. v. Pray*, 204 F. 2d 821 (6th Cir. 1953); *Boney v. Citizens Mut. Auto Ins. Co.*, 333 Mich. 435, 53 N.W. 2d 321 (1953); *Bellish v. C. I. T. Corp.*, 142 Ohio St. 36, 50 N.E. 2d 147 (1943); *Kenyon v. Knights Templar and Masonic Mut. Aid Ass'n.*, 122 N.Y. 247, 25 N.E. 299 (1890).

[26] In letters ten times the size of any others in prominent lighting and position appeared the words, "Airline Trip Insurance," below that on a placard appeared the words, smaller than those above but many times the size of the other words of the same placard;

DOMESTIC
AIRLINE TRIP INSURANCE

25¢ for each $5,000 Maximum $25,000

Below in much smaller print on the placard it was stated that this policy covered scheduled airlines only. Lachs v. Fidelity & Casualty Co., 306 N.Y. 357, 118 N.E. 2d 555 (1954).

Or the deceased may have been aware of the distinction between "scheduled" and "non-scheduled" and may have read the policy but may not have realized that she was a passenger on a "non-scheduled" airline. In either case it is arguable that the policy was not ambiguous because the deceased knew the difference in the meaning of these terms and therefore recovery should be denied. In the first factual situation, although the deceased may not have read the policy, it is possible to assume that she was under a duty to do so. In the second example, it can be further assumed that she had a duty to discover the classification of the airline on which she was riding. In reference to both these situations however, the court pointed out that the deceased may not have been remiss in her duty in view of the circumstances under which the insurance was sold.[27]

Contracting By Machine

In dealing with vending machine insurance generally, there would seem to be a question of determining at what point in the transaction the contract came into force. It would be either at the time of assent to the terms in the policy itself or at the time of assent to the writing on the face of the machine. The insured could not obtain the policy to read until she put her money into the machine and once the money was put into the machine she could not regain it.[28] Therefore, the insured was forced to rely on the writings on the face of the machine and it can be said that the contract came into force sometime before the insured had an opportunity to examine the policy. Under any other view the insurance company would be able to retain the premium without giving any consideration in return.

From the foregoing it appears that the decision in the *Lachs* case was justified. Denial of summary judgment was proper since a valid question of fact presented itself in that a jury could find that the term "scheduled airline" does have more than one meaning. The jury could also find that the defendant's action could have been taken as an invitation to all air passengers to insure themselves with the defendant insurance company. One way to prevent future occurrences of this nature would be to have uniform rules established for the sale of airline trip insurance through vending machines. The CAB might receive its authority for such action from Section 2, the "declaration

[27] While the insured would normally be expected to read the policy and have the burden of knowing the terms of the contract, the court stated at 118 N.E. 2d 557, "There is also an envelope in the machine to mail to the beneficiary, for the insured is not expected to read the policy on the plane." The court further stated at 559, "If the rule here was not made strict when machines are utilized it would mean that in this large terminal *all* persons who put money into the machines there and then, thinking they were insured, went off on one of the ten so-called 'non-scheduled air carriers,' would have no insurance for their beneficiaries and the company would be in receipt of contributions for which no service was ever rendered."

Generally it is the duty of the airline passenger to discover what type of plane she is flying in, but the court pointed out, at 558-9, that ". . . since defendant put one of its automatic vending machines in front of the ticket counter of the Consolidated Air Service which, according to an affidavit submitted by defendant, was utilized by all non-scheduled airlines operating out of the Newark Airport, as a processing point for their passengers, and before any passenger on a non-scheduled airline could receive his ticket he was required to present his 'exchange order' at said counter we think a jury might find that the defendant was inviting those passengers to insure themselves by its 'Airline Trip Insurance.' "

[28] There was a sharp dispute as to whether there was a specimen policy on the machine that the decedent used as there were policies on some but not all of the machines at the airport. The specimen policy entered into evidence by the defendant had the words "scheduled airline" obliterated by bold face print stamped on the policy to the effect that, "This policy is limited to aircraft accidents, Read it carefully."

of purposes section" of the Act.[29] However, recent legislation[30] would preclude the CAB from taking such action since Congress has provided that the control of insurance is to be left to the states and that no federal statute will supercede state law unless the federal act relates specifically to the business of insurance.

It may be argued that the insurance company should not be allowed to make the distinction between "scheduled" and "non-scheduled" airlines. When these classes were first established there was a real difference between the operations and the attendant hazards of the two. But, now with the evolution of the air industry, these distinctions cannot validly be made because the level of operations and the risks encountered are quite similar. Three alternatives which may be used to avoid the situation of the *Lachs* case would be: (1) to list on the face of each machine, in a prominent position, each airline using that particular airport whose passengers the insurer intends to cover, (2) to make no distinction between "scheduled" and "non-scheduled" airline, or (3) to require the insurance company to remove all the machines and replace them with insurance agents.

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[29] 52 Stat. 980 (1938), 49 U.S.C. 402 (1952).

[30] 61 Stat. 448 (1947), 15 U.S.C. 1012 (1952). This statute was enacted after the Supreme Court held in *United States v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533 (1943), *rehearing denied* 323 U.S. 811 (1944), that the business of insurance was subject to the Sherman Act.

DIGEST OF RECENT CASES

FEDERAL v. STATE REGULATION—CARRIAGE OF INTERSTATE PASSENGERS WITHIN STATE

Civil Aeronautics Board v. Friedkin Aeronautics, Inc.
2 CCH Aviation Law Rep. 17,457 (S.D. Cal. Sept. 16, 1954)

Defendant airline operated wholly within the state of California. However, numerous passengers were carried whose journey either began or ended outside of California. The CAB filed an action alleging failure to obtain a certificate of public convenience and necessity. The court, recognizing that this was a case of first impression, refused to be bound by cases from the field of bus and railroad transportation, and looked solely to the Civil Aeronautics Act and the intent of Congress. In spite of language in the act defining air commerce and transportation as that which directly *affects* interstate air commerce, the court found the intent of Congress in the field of economic regulation to be to leave regulation of carriers operating wholly within the state to the states. Although Congress has the power to preempt the entire field, as it has done in safety regulation of airlines, the legislative history shows that it did not so intend. Since the defendant was not engaged in interstate air transportation, the action was dismissed for lack of jurisdiction.

TORTS—CONTRIBUTORY NEGLIGENCE

Kenty v. Spartan Aircraft Co.
276 P. 2d 928 (Okla. Oct. 12, 1954)

Plaintiff was severely injured in a crash resulting from running out of fuel while flying from Tulsa to Dallas. Previously, Plaintiff had instructed defendant aircraft company to service his plane for the flight but defendant had mistakenly serviced the wrong plane. Plaintiff had neglected to check the fuel supply and to check the number on the service ticket which would have shown the mistake. The court held that an instruction to the effect that the defendant had no right to expect the plaintiff to check the gasoline supply was properly refused. Instructions on contributory negligence are merely to define the term, not set out facts which do or do not constitute contributory negligence.

SALVAGE OF SEAPLANE—DISMISSAL OF SUIT—AWARD OF COSTS

Lambros Seaplane Base, Inc. v. M/S Batory
125 F. Supp. 23 (S.D.N.Y. Oct. 21, 1954)

While the transatlantic liner, Batory, was proceeding to England, a seaplane was sighted. The pilot of the plane circled the ship and shouted that he was lost and without gas or compass. This was later proved to be untrue. The pilot was taken aboard and the plane hoisted on the ship and transported to England. The owner of the plane demanded its return which was refused until transport charges were paid. When these were not paid, the plane was sold at public auction. The owner of the plane filed a suit for damages and the owner of the ship filed one for salvage. The lower court consolidated the suits and dismissed the salvage claim of the ship owner. The upper court dismissed the plane owner's claim but made no provision for costs in the lower court. In the present action, recovery of costs was denied to the plane owner since the salvage suit was not a nuisance action but raised serious questions of law. Because both claims were dismissed, each party had to pay his own costs.

AIR CARRIER LIABILITY FOR CHARGES FOR EXAMINATION OF ARRIVALS FROM FOREIGN PORTS

Air Transport Association of America v. Brownell
124 F. Supp. 909 (D.D.C. Oct. 11, 1954)

Acting under a statute authorizing him to set extra compensation for employees of the Immigration and Naturalization Service who perform overtime service in connection with planes arriving from foreign ports, the Attorney General fixed such compensation for airplanes arriving from Hawaii, Alaska, and Puerto Rico. The court recognized the desirability of applying the statute to arrivals from these parts, but nevertheless held they were not foreign ports, but rather part of the United States. Plaintiff airlines were held entitled to a declaratory judgment to this effect because of the possibility of a multiplicity of suits and mounting interest charges in case they should be held liable for the extra compensation.

WORKMAN'S COMPENSATION—ACCIDENT ARISING OUT OF COURSE OF EMPLOYMENT

Scott and McMillan Mortuary v. Rhyan
275 P. 2d 891 (Ariz. Nov. 1, 1954)

Decedent was employed by defendant to drive his ambulance and administer oxygen, including the answering of emergency calls. On the day of the accident, decedent had driven a small child suffering from poliomyelitis to the airport to be flown to Phoenix, Arizona. No arrangements had been made by the parents for a nurse to operate the oxygen equipment during the flight, so decedent accompanied them for this purpose. The plane crashed shortly after take-off killing all aboard. The court held that although the decedent's act was unusual, it could still be in the course of his employment. Emergencies may expand the course of employment and in this case, it was foreseeable that an emergency might require administering oxygen in places other than the ambulance. If the conditions of employment create a "zone of special danger" compensation may be granted. The court was also influenced by the fact that the employer was at the airport and made no objection to the decedent's subjecting himself to the risk of the flight.

TORTS—ABSOLUTE LIABILITY

Boyd v. White
276 P. 2d 92 (Cal. App. Nov. 12, 1954)

Defendants rented a plane to an instructor to be flown by a student pilot. During a solo flight the plane crashed into Plaintiff's home, allegedly causing her fright and mental suffering in addition to damaging her real property. Plaintiff brought suit on the theory that an aircraft owner renting to a student pilot is absolutely liable for damages resulting from a crash. Under a statute providing that the owner of a plane is liable for damages caused by a forced landing "as provided by law," the court held that liability is to be determined by the normal rules of bailments, respondeat superior and negligence. The court felt that the operation of an airplane today is not such a dangerous activity that it can be ultrahazardous and the owner thereby subjected to absolute liability. Neither would the court impose absolute liability upon all who rent to student pilots since these pilots are not, as a matter of law, incompetent. The Plaintiff's argument that, as a matter of public policy, the owner of aircraft should insure themselves against the risk of damage by student pilots was said to be a consideration for the legislature and not for the courts.

TEMPORARY MAIL RATES—TRANSPORTATION OF FIRST CLASS MAIL TO WEST COAST

American Airlines Inc., et al.
CAB Docket No. 6901 (Nov. 30, 1954)

The CAB has issued an order setting a temporary rate of 18.98 cents per ton mile for air transportation of first class mail to West Coast areas. The final rate will be retroactive to the time the service is inaugurated. The Board felt it could not fix a final rate because of the lack of evidence on the experiment on the East Coast. However, it felt justified in establishing the temporary rate because the fixing of the final rate would require a long time during which the airlines would be performing services. The Board pointed out that the fixing of a temporary rate is not a condition precedent to the inauguration of the service.

Although the railroads were given permission to intervene only in the determination of the final rate, two issues raised by them were considered. The Board found that it did have authority under the Civil Aeronautics Act to fix rates for the non-obligatory transportation of mail on a space available basis. In answer to the asserted violation of Federal law by the Postmaster in this action, the Board ruled that the violation was not so clear, and, even if it were more obvious, the Board would not interpret and apply a statute in the Postmaster's realm of activity.

ACQUISITION OF LOCAL AIR CARRIER BY TRUNKLINE CARRIER

Continental—Pioneer Acquisition Case
CAB Docket No. 6457 et al. (Dec. 7, 1954)

In departing from its long policy of keeping trunkline and feeder services separate, the CAB allowed a trunkline carrier to acquire the assets of a local carrier because the substantial similarity of the two did not breach the underlying reasons for the rule. In finding that the acquisition would not jeopardize other carriers, the Board ruled that the possibility of route restrictions being removed in the future was not material. The Board was further influenced by the reasonableness of the price, the resulting efficiency and improvement of service to the public, and the reduction in the amount of subsidy. On the other hand, the Board had no interest in whether the proceeds were used to pay off debts or were distributed to shareholders, thus ignoring the assertions of a "bank bail out." Likewise immaterial was the fact that Continental had previously sought a certificate to operate in the acquired territory. In regard to labor provisions, approval was made conditional upon the acceptance of the terms of the *Flying Tiger—Slick Merger* case. Finally, the Board ruled that it would not offset the profit under the acquisition against the mail subsidy of Pioneer for the practical reason that such action may prevent the acquisition and for the legal reason that when the profit is realized, Pioneer would no longer be an air carrier with a need for subsidies.

BIBLIOGRAPHY

CURRENT LITERATURE ON AVIATION

BOOKS AND PAMPHLETS

Abraham, H. J. DER LUFTBEFORDERUNGSVERTRAG. Stuttgart, Verlag Ferdinand Enke, 1955. 80p. DM 5.

A treatise on the rights and duties of the air cargo carrier and the air consignor under international and German air law.

Air Line Pilots Association. THE ALPA STORY: A HISTORY OF THE BACKGROUND, FUNCTIONS, AND ORGANIZATION OF THE AIR LINE PILOTS ASSOCIATION, INTL. Chicago, The Association, 1955. 44p.

THE AIRCRAFT YEAR BOOK 1954. Official Publication of the Aircraft Industries Association. Thirty-sixth Annual Edition. Washington, Lincoln Press, Inc., 1955. 472p. $6.00.

Airport Development and Operation Conference, Syracuse, N. Y., October 19-20, 1954. PROCEEDINGS. Sponsored by the New York State Department of Commerce in cooperation with New York Aviation Trades Association, Inc. Albany, N. Y., New York State Department of Commerce, 1954. 137p.

American Airlines. A STUDY OF THE EFFECT OF AIR TRANSPORTATION UPON PROFITS RESULTING FROM CHANGES IN COSTS AT VARIOUS LEVELS OF VOLUMES WHEN PRICES REMAIN CONSTANT. New York, American Airlines, 1954. 30p.

Angel, J. L. CAREERS IN AVIATION. New York, World Trade Academy Press, 1955. 21p. $1.00.

Beecken, Henry, & Associates. FINANCIAL STUDY OF THE DOMESTIC AIRLINE INDUSTRY AND AMERICAN AIRLINES, INC. Washington, Henry Beecken & Associates, 1954. 104p. $20.00.

BEITRAGE ZUM INTERNATIONALEN LUFTRECHT. Festschrift zu Ehren von Prof. Dr. iur. Alex Meyer. Dusseldorf, Droste-Verlag, 1954. 160p. (Verkehrswissenschaftliche Veröffentlichungen: Heft 32).

Cribbett, George. EUROPEAN AIR TRANSPORT: ITS PROBLEMS AND PERSPECTIVES. Rome, Centro per Lo Sviluppo dei Aeri, 1955. 21p.

Dohm, John. RULES OF THE AIR. North Hollywood, Calif., Pan American Navigation Service, 1954. 185p. $2.00.

FACHWÖRTERBUCH FUR DIE ZIVIL-LUFTFAHRT 2. AUFL. Band 1: English-deutsch. Frankfurt, Bundesanstalt für Flugsicherung, 1954. DM 9.50.

Interavia ABC. DIRECTORY OF WORLD AVIATION. 1955. Geneva, Interavia, S. A., 1955. 1150p. $12.00.

International Civil Aviation Organization. FINANCIAL DATA, 1947-1953. Montreal, International Civil Organization, 195. 159p. (*Its* Digest of Statistics No. 48. Series F-7). $2.00.

International Civil Aviation Organization. MANUAL OF AIRPORT AND AIR NAVIGATION FACILITY TARIFFS. 3d ed. 1 January 1955. Montreal, International Civil Aviation Organization, 1955. (Doc. 7100-At/707) $2.50. Looseleaf.

Pogue, L. Welch. HELICOPTERS AND STATE AERONAUTICAL STATUTES. Memorandum to Helicopter Council, Aircraft Industries Association of America. Washington, Pogue and Neal, Attorneys, 1955. 42p.

Radio Technical Commission for Aeronautics. ANTICIPATED VOLUME AND DISTRIBUTION OF ROTARY WING TRANSPORT OPERATIONS IN THE NEW

YORK METROPOLITAN AREA, 1965. January 6, 1955. Final Activity. Report of Traffic Subcommittee S. C. 63. Washington, The Commission, 1955. 9p. and appendices.

Sampaio de Lacerda, Joze Candido. CURSO DE DIREITO COMERCIAL MARITIMO E AERONAUTICO; DIREITO PRIVADO DE NAVEGACIO. 2d ed. Rio de Janeiro, Livraria Freitas, 1954. 496p.

Schleicher, Rudiger and Friedrich Reymann. RECHT DER LUFTFAHRT KOMMENTAR ZUR DEUTSCHE LUFTFAHRTGESETZGEBUNG. Berlin, Carl Heymanns Verlag, 1954. 514p. DM 28. Reprinted from 1937 edition.

Schweickhardt, A. SCHWEIZERISCHES LUFTTRANSPORTRECHT. Zurich, Scientia-Verlag ag., 1954. 136p. Fr/DM 25:50.

A SURVEY OF AIR TRANSPORTATION REQUIREMENTS FOR THE IDAHO-OREGON-WASHINGTON AREA. Prepared for the Idaho Department of Aeronautics, Oregon State Board of Aeronautics, Washington State Aeronautics Commission. Seattle, Washington State Aeronautics Commission, 1955. 155p.

U. S. Air Coordinating Committee. AIRPORT SAFETY, AN AIR COORDINATING COMMITTEE REVIEW OF POLICIES AND ACTIONS IN THE FIELDS COVERED BY THE DOOLITTLE AIRPORT COMMISSION, MAY 16, 1952. Washington, The Committee, 1954. 36p.

U. S. Civil Aeronautics Board. ANNUAL REPORT OF THE CIVIL AERONAUTICS BOARD. 1955. Washington, U. S. Govt. Print. Off., 1955. 67p. $.70.

U. S. Civil Aeronautics Board. ORIGINATION-DESTINATION AIRLINE REVENUE PASSENGER SURVEY, MARCH 1-14, 1954. Washington, The Airline Finance and Accounting Conference, 1954. 4v. $25.00.

U. S. Congress. Senate. Interstate and Foreign Commerce Committee. AVIATION STUDY PREPARED FOR COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, ON HEARINGS HELD ON S. 2647, INCLUDING PROPOSED SUBSTITUTE FOR INTRODUCED BILL, TOGETHER WITH COMMITTEE STAFF ANALYSIS. Washington, U. S. Govt. Print. Off., 1955. 150p. (See p. —— this issue.)

Wilson, G. L. TRANSPORTATION AND COMMUNICATIONS: ECONOMY, MANAGEMENT, AND REGULATION. New York, Appleton, 1954. 757p. $6.00.

PERIODICAL ARTICLES

Airports in the New York City Region, by Fred M. Glass. New York State Commerce Review, Dec. 1954: 1-6.

Aviation and the Development of Remote Areas, by the Duke of Edinburgh. Journal of the Royal Aeronautical Society, Jan. 1955; 59:3-14.
Discusses the use of aviation in agriculture, pest control, surveying, freight and other purposes in the British Commonwealth Empire.

Aviation Tort Cases Exclusive of Major Disaster Situations, by C. Barwick and R. R. Richardson. Insurance Counsel Journal, Jan. 22, 1955: 68-72.

By Arild Viking to the New World, by P. A. Blackburn. Interavia; Review of World Aviation, No. 2, 1955; 10:90-97.

Commercial Aviation. Flight, Mar. 11, 1955; 67:296-338.
Special issue including "Airlines of the world," pp. 301-308 and "Transport aircraft, 1955," pp. 321-331.

The Evolution of Arctic Airways, by John Grierson. Journal of the Royal Aeronautical Society, Jan. 1955; 59:15-29.

The Development of Air Freight, by R. W. Spurgeon. Institute of Transport Journal, Nov. 1954; 26:10-17.

"Fifty Years On"—Air Transport in A.D. 2005, by Peter G. Masefield. Interavia; Review of World Aviation, No. 1, 1955; 10:44-45.

Financing for Business Flying, by Tom Ashley. Flight, Feb. 1955; 43:20-22.

From Gold to Diamond in Air Transport Engineering. SAE Journal, Feb. 1955; 63:97-104.

Forecasts developments for the next 50 years.

Helicopter Revolutionizes Topographic Mapping of Remote Areas, by Gerald Fitzgerald. Civil Engineering, Dec. 1954; 24:798-801.

How Experts See Air Transport in 1985, by Frank Shea, Jr. Aviation Week, Jan. 31, 1955; 62:75-76, 78.

How Toledo's New Airport Will Pay Its Own Way, by J. H. Winchester. Aviation Age, Jan. 1955; 23:122-127.

The Importance of Air Freight, by Lester Castlemaine. Purchasing Journal, Dec. 1954; 10:702-708.

A Look at LACSA. Air Transportation, Dec. 1954; 25:14, 25-26.

Report on the operations of Lineas Areas Costarricenses.

New Dimensions in Air Transportation, by Selig Altschul. Commercial and Financial Chronicle, Feb. 24, 1955; 181:1, 32-33.

The Orient's Own; the Story of Civil Air Transport. Esso Air World, Sept./Oct. 1954; 7:30-34.

Our Charter Air Service Needs a New Approach, by John H. Frederick. Distribution Age, Feb. 1955; 54:41, 71.

Outline of the Law on Carriage by Air, by A. R. Paterson. Canadian Bar Review, Nov. 1954; 32:982-983.

Pacific Highway, by Squadron Leader West. Aeronautics, Jan. 1955; 31: 64-70.

Account of Canadian Pacific Airlines.

Passenger Emplacement, by R. Cox Abiel. Aeronautics, Jan. 1955; 31:32-33.

Planning for Urban Helicopters, by Robert Horonjeff and Howard S. Lapin. Air Transportation, Nov./Dec. 1954; 8:103-106.

The Port of New York Authority, by Howard S. Cullman. Transport and Communications Review, Oct./Dec. 1954; 7:10-20.

Recent European Airport Development. Modern Transport, Feb. 5, 1955; 72:12-13.

Sabena Inter-City Services. Aeroplane, Dec. 17, 1954; 87:878-881.

Short Air-Hops Pay Off, by Marion L. Briggs. Challenge, Dec. 1954; 3:49-52.

Some Thoughts on Economic Trends in Air Transport, by M. H. Curtis. Transport and Communications Review, Oct./Dec. 1954; 7:1-9.

State Taxation of Interstate Carrier Equipment Airplanes. Wayne Law Review, Winter 1954; 1:46-52.

FOREIGN ARTICLES

Die Beschlüsse der Pariser Aussenminister-Konferenz vom 23.10.1954 *und die deutsche Zivilluftfahrt*, von Alex Meyer. Zeitschrift für Luftrecht, heft 1, 1955; 4:1-6.

L'Economie du transport aérien et l'aviation civile en Algérie, par Henry Mourer. Revue générale de l'air, No. 4, 1954; 17:339-374.

L'Europe et ses transports par air, par Paul Chauveau. Politique étrangère, Dec. 1954; 19:567-580.

Les formes de la collaboration internationale dans le transport aérien, par D. Hagenau. Revue française de droit aérien, Oct./Dec. 1954; 8:345-379.

Die internationale Rechtsprechung zum Warschauer Abkommen seit Sommer 1953, von H. J. Abraham. Zeitschrift für Luftrecht, heft 1, 1954; 4:27-33.

Die Kausalität im Lufthaftplichtrecht, von Wilm. Weimar. Zeitschrift für Luftrecht, heft 1, 1954; 4:18-26.

Les problèmes juridiques de l'accès aérien des Puissances occidentales à Berlin, par J. Mallet. Revue générale de l'air, No. 3, 1954; 17:235-243.

Reflexions sur l'internationalisation des lignes aériennes, par M. Saporta et F. Serraz. Revue générale de l'air, No. 4, 1954; 17:375-379.

Le retrait du certificat de navigabilité. Considérations sur le régime de la responsabilité, par M. Saporta. Revue générale de l'air, No. 3, 1954; 17:244-259.

Le rôle du Conseil de l'O.A.C.I. comme administrateur des services de navigation aérienne, par René-H. Mankiewicz. Revue française de droit aérien, July/Oct. 1954; 8:223-236.

Sulla revisione della Convenzione di Varsavia sul trasporto aero, di Amedeo Giannini. Rivista aeronautica, Dec. 1954; 30:1373-1382.